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# BEYOND THE PLEDGE OF ALLEGIANCE: HOSTILITY TO RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE

## HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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# BEYOND THE PLEDGE OF ALLEGIANCE: HOSTILITY TO RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE

**TUESDAY, JUNE 8, 2004**

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:11 p.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee, presiding.

Present: Senators Cornyn, Sessions, and Feingold.

## OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CORNYN. This hearing of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights will come to order.

I want to thank Senator Hatch, the Chairman of the full Committee, for scheduling this hearing, as well as thank the distinguished Ranking Member, Senator Feingold, who will be here momentarily, and his staff for working with my office to help make this hearing possible.

We have a number of witnesses, and that is one reason why I didn't want to delay the hearing any longer, because many have come an awful long way to be here with us, so I am anxious to get to their testimony as soon as possible.

I will make a few brief remarks, and then Senator Feingold, of course, will have an opportunity to make any remarks he sees fit. And, without objection, my full written statement will be made part of the record. Then, of course, we will have a panel of Members of Congress. Senator Shelby, Senator Landrieu, and Representative Edwards will be our first panel, and we will proceed from there.

The United States Supreme Court will soon decide whether the First Amendment forbids school teachers across America leading students in the voluntary recitation of the Pledge of Allegiance, simply because the Pledge affirms what we all know to be true—that our Nation was founded "under God."

The Senate has unanimously and repeatedly condemned the Ninth Circuit's contrary ruling striking down the Pledge. A majority of the Members of this Subcommittee filed the first amicus brief

in the U.S. Supreme Court defending the Pledge on the merits. And the vast majority of Americans agree with the Senate—rather than with the Ninth Circuit and the American Civil Liberties Union—on the constitutionality of the Pledge.

But however the Court ultimately rules, the Pledge case reminds us of a broader, systemic problem caused by the Court's previous rulings: an unjustifiable hostility to religious expression in public squares across America. And just as there is bipartisan agreement on the constitutionality of the Pledge of Allegiance, so should there be bipartisan agreement that Government should never be hostile to expressions of faith.

Accordingly, our hearing today is entitled "Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square." Our witnesses will examine issues of Government discrimination against religious expression generally, including both discrimination against religious versus non-religious expression in Government speech, as well as discrimination against purely private expressions of faith.

It is difficult to think of a provision of the United States Constitution that has been so badly misunderstood and misapplied as the First Amendment with respect to the subject at hand or with worse consequences for our coarsened culture and discourse.

The First Amendment contains two important provisions with respect to religious liberty. It respects the "free exercise" of religion against Government interference or intrusion. And it also provides that Congress shall make no law "respecting an establishment of religion."

The Founders included the Establishment Clause because they wanted to forbid Government from taking any action either to establish an official state church or to favor a particular religious denomination in some way.

Notably, nothing in these provisions requires Government to be hostile to religious speech or religious practice or religious liberty overall. The Constitution nowhere requires Government to expel expressions of faith from the public square. Nor does the Establishment Clause forbid Government from acknowledging, indeed celebrating, the important role that faith has historically played in the lives of the American people, dating back to the Founders themselves.

This week, the Nation mourns the passing of a great man, President Ronald Reagan. I think he spoke for the American people when he said in 1983, and I quote, "When our Founding Fathers passed the First Amendment, they sought to protect churches from government interference. They never intended to construct a wall of hostility between government and the concept of religious belief itself."

After all, references to faith permeate our Nation's history. References to faith can be found across our Nation's most important institutions of Government, in our fundamental legal documents, and on our cherished cultural treasures. Our currency is emblazoned with the phrase "In God We Trust." The public buildings of all three branches of Government—including the United States Supreme Court—are decorated with numerous references to God. The Declaration of Independence acknowledges the Founders' "firm reli-

ance on the protection of Divine Providence." It talks about "nature's God" and our "Creator," while the Constitution itself refers to "our Lord."

An Act of Congress authorized President Washington to issue the Nation's first Thanksgiving Proclamation. Moreover, that Proclamation specifically referenced the "duty of all Nations to acknowledge the Providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor." And on the very day that Congress proposed the First Amendment, it also approved the Northwest Ordinance, which expressly directed to U.S. territorial governments that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

So there is ample precedent and strong tradition to support Government speech that acknowledges, accommodates, and indeed celebrates the importance of faith in the lives of the American people.

Moreover, the First Amendment specifically protects private religious expression in the public square by guaranteeing both the free exercise of religion and freedom of speech against Government interference. As Justice Scalia has aptly written, "a priest has as much liberty to proselytize as a patriot"—a principle that holds in the public square the same as on private property.

Despite these clear constitutional commands, however, some courts, led by the United States Supreme Court, have demonstrated a clear and unmistakable hostility towards religious expression in the public square.

Given this troubling and incoherent jurisprudence, it is no surprise that local governments have far too often demonstrated similar hostility to religious expression as a result. Whether out of ideological motivation, ignorance of the law, or simple fear of litigation, local governments across the Nation have repeatedly attempted to banish faith from the public square.

Today, we will hear the personal stories of citizens who have experienced Government hostility to religious expression firsthand.

They are just a few of the countless examples from across the country. Children across America are being barred from sharing candy canes with classmates. Teachers are being reprimanded for circulating the President's Proclamation of a Day of National Prayer through their school e-mail accounts. Schools are specifically targeting religious groups and excluding them from their campuses.

The situation has become so extreme that even patriotic and other non-religious references to faith have been attacked. It is simply patriotic to recite the Pledge of Allegiance, yet the Ninth Circuit believes it is unconstitutional in public schools. The Los Angeles County seal is under attack by the American Civil Liberties Union because it includes a depiction of a cross—a cross that simply reflects "the historical importance of the Catholic missions" in California.

This pervasive hostility to faith is wrong, and it is without constitutional basis.

I hope today's hearing will accomplish two things. First, we must reaffirm our bipartisan commitment to religious freedom and lib-

erty in the public square. And, second, we must recognize that unfortunate and unjustified hostility to religious expression is pervasive, and it must be stopped.

The restoration of religious liberty and celebration envisioned by the Founders should be a bipartisan effort. The judicial attack on the Pledge of Allegiance has been unanimously condemned by the United States Senate. And both the Clinton and Bush administrations have issued Department of Education guidelines forbidding discrimination against religion by public schools, consistent with a Congressional mandate in the No Child Left Behind Act.

I began my remarks by quoting public expenditure review. I would like to close with the words of President Clinton, who stated in 1995: "Americans feel that instead of celebrating their love for God in public, they're being forced to hide their faith behind closed doors. That's wrong. Americans should never have to hide their faith. But some Americans have been denied the right to express their religion and that has to stop. That has happened and it has to stop."

I agree. Americans should never have to hide their faith. They have the constitutional right to exercise their faith openly—not just at home, but in the public square as well.

[The prepared statement of Chairman Cornyn appears as a submission for the record.]

Chairman CORNYN. With that, I will turn the floor over to the distinguished Ranking Member, Senator Feingold, for any opening statement he cares to make.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman.

A guarantee of religious freedom was fundamental to our Nation's founding. The Pilgrims and other settlers braved crossing the Atlantic Ocean because they were fleeing religious persecution and wanted to live where they could exercise their religious beliefs freely. And so it is not surprising that a guarantee of the free exercise of religion without Government intrusion would be contained in the very first line of the first of ten rights guaranteed to every American in the Bill of Rights.

The First Amendment to the Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In other words, the First Amendment contains two important guarantees of religious freedom: the Free Exercise Clause and the Establishment Clause. Americans have the right to exercise their religion, and Americans of any faith or no faith at all have the right to be free from Government establishment of religion in their lives. Together, the Free Exercise Clause and the Establishment Clause have allowed religion in our Nation to flourish. In addition, as President Bush has noted, preserving religious freedom has helped America avoid the wars of religion that have plagued so many cultures throughout history with deadly consequences.

So, Mr. Chairman, with all due respect, I disagree a bit with the title of this hearing, "Hostility to Religious Expression in the Public Square." At least in my experience, I do not think that there is

such widespread hostility. There may be confusion. There may be some in our country who would like to censor all public expressions of religious faith, and there are others that may want to read the Free Exercise Clause in isolation and then ignore the Establishment Clause, even to the point of having a state-sponsored religion.

The fact is that the First Amendment in its entirety has served our Nation well and has allowed religious expression to thrive and not be stifled. Americans are a deeply religious people, and yet we have no official state religion. Those two facts taken together succinctly express the genius of the Framers in the area of religious freedom. In recent years, there has been a lot of confusion about what the religion clauses of the First Amendment require and forbid. I hope that this hearing does clarify those areas of confusion, from the Pledge of Allegiance to religious garb in schools, to expression of religious faith by private citizens in public buildings or at public events, to Government-sponsored sectarian prayers at such events.

Ours is a Nation built on diversity and religious pluralism. The legacy of religious liberty in our Nation is unparalleled in human history, and we in the Congress have a special duty to protect and nurture that legacy. I supported the Religious Freedom Restoration Act of 1993. I thought the Supreme Court had made a mistake in the Smith decision in 1990 by reducing the protection of religious expression from governmental intrusion. I was disappointed when the Court later struck down the Religious Freedom Restoration Act as an inappropriate exercise of Congressional power.

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act and may need to enact further legislation to protect the free exercise of religion. But I hope it does so in a way that respects the Establishment Clause as well.

Americans were acutely reminded of our Nation's tradition of religious freedom earlier this year when France banned religious articles and symbols in state schools. This meant that Christian, Jewish, Muslim, and Sikh students and students of other faiths would be denied the right to practice their faith once they entered the schoolhouse door. Thankfully, our Nation has never seen a similar effort to stifle individual, voluntary religious expression by students in our public schools, although there have been instances where Government officials misunderstood the law.

As we will hear from Nashala Hearn this afternoon, she experienced one such unfortunate episode. But I am very pleased that her case reached the proper result—a result that reaffirms religious freedom.

Like many Americans, Mr. Chairman, I disapproved of the Court of Appeals decision in *Newdow* v. *U.S. Congress*, the Pledge of Allegiance case. I joined my Senate colleagues when we unanimously expressed our view that the Pledge is constitutional. The phrase "under God" in the Pledge is not and should not be construed as Government establishment of religion. The Supreme Court will issue its decision in the Newdow case any day now, and I, like most Americans, am hopeful that the Supreme Court will uphold the Pledge.

While I do think the lower court went too far in finding a violation of the Establishment Clause, we should, nevertheless, recog-

nize that the Establishment Clause has an important role in protecting all Americans and their right to exercise their religion or no religion at all.

Today, we will hear from Steven Rosenauer, whose experience, I believe, will illustrate the need to be mindful of the importance of the Establishment Clause as we consider the issue of religious expression at public events.

I am also very pleased that we have Reverend Brent Walker and Professor Melissa Rogers here this afternoon. Reverend Walker is with the Baptist Joint Committee on Public Affairs and is an ordained Baptist minister. He understands the legal, practical, and theological dimensions of religious freedom. Professor Rogers was formerly with the Pew Forum on religion and public life, and currently a professor at Wake Forest University's Divinity School. She will give us insight into the legal and policy issues involved in this debate, which is as old as the republic itself.

Finally, I want to welcome our Senate colleagues on the first panel, of course, and Representative Chet Edwards of Texas, one of the most passionate defenders of religious liberty in the Congress and in our Nation.

In sum, Mr. Chairman, I believe that the First Amendment provides parameters that have been absolutely critical in protecting religious freedom and allowing Americans to thrive in and practice whatever religion they choose. These are parameters that have served our Nation well since its founding. Despite the title of this hearing, I believe that the First Amendment is alive and well in our country, as is religion.

Thank you, Mr. Chairman. I do look forward to the testimony.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman CORNYN. Thank you, Senator Feingold.

And, with that, we will turn to our distinguished panel and ask you, Senator Shelby, if you will lead off and make such statement as you see fit.

## STATEMENT OF HON. RICHARD SHELBY, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SHELBY. Thank you, Mr. Chairman. First of all, I would ask that my entire written statement be made part of the record.

Chairman CORNYN. Without objection.

Senator SHELBY. Chairman Cornyn, Senator Feingold, Senator Sessions, and Members of the Subcommittee, I want to thank you for holding this important hearing and for having me here to discuss briefly the Constitution Restoration Act. Joined by Senators Miller, Brownback, Allard, Graham, Bunning, Lott, and Inhofe, I introduced Senate bill 2323, the Constitution Restoration Act. Like millions of Americans, I believe that the courts have exceeded their power. This legislation recognizes the rights of the States and the people as embodied in the Declaration of Independence and the Constitution, Ninth and Tenth Amendments, to acknowledge God. In short, this legislation goes to the very foundation of our country and the legitimacy of our system of Government.

Over the years, we have seen a disturbing and growing trend in our Federal courts to deny the rights of our States and our citizens

to acknowledge God openly and freely. These tortured legal decisions distort our Constitution, our Nation's history, and its tradition in an effort to secularize our system of Government and to divest morality from our rule of law.

Four years ago, Mr. Chairman, the Supreme Court determined that students could not engage in voluntary prayer at a school football game. Last year, as you noted, the Ninth Circuit Court of Appeals ruled that it was unconstitutional to recite the words "one Nation, under God" in the Pledge of Allegiance. And a district court in my home State of Alabama ruled that it was unconstitutional to display the Ten Commandments.

I believe it is unfortunate that there are so many examples to point to because the simple fact is our Government and our laws are based on Judeo-Christian values and a recognition of God as our Creator. The Declaration of Independence, by which we justify the very foundation of our political system, holds these truths to be self-evident, "that all men are created equal, that they are endowed by the Creator with certain inalienable rights."

Our motto, Mr. Chairman, as you noted, is "In God We Trust." It is enshrined on our currency. Our national anthem recognizes our motto as "in God is our trust."

As Federal officials, we each took an oath of office swearing to uphold the Constitution, so help me God. The President takes a similar one. State and local officials and our military personnel all swear a similar oath. Jurors and witnesses in our State and Federal courts take an oath, as do witnesses before Congress, to tell the truth, so help me God.

Our courts, including the Supreme Court, recognize God in their official proceedings. Both the House and Senate acknowledge God through an opening prayer every morning. Our public buildings and monuments honor this heritage through various depictions of the basic moral foundations of our laws and our system of Government.

My point, Mr. Chairman, is this: that you simply cannot divest God from our country. Our country has no foundation without a basic recognition that God invests us at birth with basic individual rights, such as the blessings of liberty that we all enjoy as Americans.

There is no question that the courts have exceeded and abused their power, in my opinion. The Constitution Restoration Act recognizes the rights of the States and the people to acknowledge God as embodied in the Declaration of Independence that you referenced and the Constitutions of the United States and the individual States.

This recognition, I believe, Mr. Chairman, is the very basis for the First Amendment prohibition against the establishment of an official church or religion. The Constitution Restoration Act further prohibits Federal courts from basing their opinions on foreign law, contrary to the Constitution that they are sworn to uphold.

The list of legal decisions abridging our right to acknowledge God is far too long. It is imperative that we exemplify how these decisions affect the lives of real people and that they are not just words on paper. I am pleased that the Committee under your leadership has taken this step and will hear testimony from individuals who

have had their rights abridged, and I look forward to their testimony.

Mr. Chairman, I thank you for allowing me to appear here, and I look forward to the others. Thank you.

[The prepared statement of Senator Shelby appears as a submission for the record.]

Chairman CORNYN. Thank you, Senator Shelby, for those thoughtful remarks and for your presence here today.

Senator Landrieu, we are delighted to have you here and would be happy to hear any opening statement you might care to make.

**STATEMENT OF HON. MARY LANDRIEU, A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator LANDRIEU. Thank you, Mr. Chairman, for inviting me to be part of this important hearing this morning, and I ask that my entire text be submitted to the record.

Chairman CORNYN. Without objection.

Senator LANDRIEU. But for the purposes, I will try to shorten it. I thank my colleagues for being present as well.

I would like to begin my testimony with a quote from Benjamin Franklin, who we all think of as one of the foremost philosophers of democracy. He asked a very important question at the Constitutional Convention. "In the beginning of the contest with Britain, when we were sensible of danger, we had daily prayers in this room for divine protection. Our prayers, sir, were heard, and they were graciously answered." He asked, "Do we imagine we now no longer need his assistance?"

Mr. Chairman, we would do well to ask ourselves Mr. Franklin's question again today. The rituals all around us indicate that we do need God's assistance for our great experiment in democracy to work. We opened the Senate today with a prayer, led by our chaplain. It has been a tradition followed from the beginning of our Nation, over 200 years, and the Senate and our Nation are stronger for it.

We are stronger because we acknowledge a higher power than our selfish interest. We are stronger because we honor the free practice of all religions. Our Nation is stronger because our Government does not endorse one religion over another. But while we maintain a separation between church and state, we do not separate God from our state.

Mr. Chairman, this hearing could not be more timely. The United States Supreme Court is expected to announce a decision very quickly in the case of *Elk Grove Unified School District* v. *Newdow* before the end of this current session.

As Members of this Subcommittee know, the Court of Appeals for the Ninth Circuit found that the phrase "under God" was not constitutional. The Pledge has been part of American life since 1942, and Congress added "under God" to the Pledge in 1954.

Like many of my colleagues, I was shocked by the Ninth Circuit decision. The day the decision was announced in June of 2002, I introduced a constitutional amendment that simply says that references to God in the Pledge of Allegiance and on our currency do not effect an establishment of religion in violation of the First Amendment. It has been reintroduced in the 108th Congress as

Senate Joint Resolution 7. Other Senators have cosponsored it with me, and I would ask that a copy of this resolution be placed in the record of this hearing.

Chairman CORNYN. Without objection.

Senator LANDRIEU. Mr. Chairman, you do not need to be a legal scholar to know that this decision is an affront to common sense. References to God are found in every one of our founding documents, from the Declaration of Independence to the Constitution itself, as well as the Pledge of Allegiance. President James Madison, who we appropriately acknowledge as the Father of the Constitution, wrote to the Virginia General Assembly, "We have staked the whole future of American civilization not upon the power of Government. Far from it. We have staked the future of our political institutions upon our capacity to sustain ourselves according to the Ten Commandments of God."

Those of you on the Committee who have studied the writings of the Founders understand that there was broad difference among them about the nature of God and the role that religion played in their personal lives. But I do not think you could find anyone present at the creation of our Nation that doubted that Divine Providence played a role in our victory and in the crafting of the document that binds us together as the United States.

So when we acknowledge that history with the phrase "under God," we do little more than reiterate something that our Founding Fathers accepted as a fundamental truth. Only something greater than ourselves could have created America. Something more significant than self-interest was needed to make E Pluribus Unum. They thought that something was the power of the divine. The Founders have almost never given us reason to doubt their wisdom. And so because of that, the Founding Fathers wanted us to only amend the Constitution when it was absolutely necessarily, I believe, and just using an extraordinary remedy. So what I have done by introducing this acknowledges that, and I do not propose this change lightly. However, the Ninth Circuit simply went too far. The separation of church and state was intended to ensure neutrality between faiths by our Government, not to eliminate all references to God and religion from public life.

Mr. Chairman, the Pledge of Allegiance has been part of the fabric of our country for 50 years. It has not been a tool of religious persecution, and no harm has come from it. I hope the Supreme Court uses common sense when it decides this case this month. If it decides to overrule the lower court and upholds the reference to God in the Pledge of Allegiance, then my amendment, S.J. Resolution 7, would not be necessary. I hope that that ends up being the case.

If the Court, however, decides to uphold the lower court's decision, the Congress can and, in my opinion, should begin the process of restoring the proper balance between church and state and to restore the historical purpose of the Pledge of Allegiance by amending the Constitution.

Thank you, Mr. Chairman.

[The prepared statement of Senator Landrieu, and the text of S.J. Res. 7, appear as submissions for the record.]

Chairman CORNYN. Thank you very much, Senator Landrieu, for being here today with the Subcommittee and for those remarks.

Congressman Chet Edwards of Texas is here, and we welcome you to the Subcommittee and would be glad to hear any statement you might have.

**STATEMENT OF HON. CHET EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Representative EDWARDS. Mr. Chairman, thank you very much. Senator Feingold, Senator Sessions, thank you for the chance to testify before you.

I support Senator Landrieu's amendment, but let me just say right up front that this hearing today is not about who is for God and who is against God, who is for prayer and who is against prayer. And I think it is important for all of us on both sides of this issue not to try to suggest that division, directly or indirectly.

While, yes, our Founding Fathers referenced Divine Providence in the Declaration, I would challenge any Member of the Subcommittee or anyone in this room to show me where the reference to God is made in the Constitution. They purposely chose not to put God in the Constitution, not because of disrespect to God but out of total respect to God and Divine Providence. Our Founding Fathers in their wisdom understood that secular Government should not have power over American citizens' souls and religious faith, and that is what the Establishment Clause is all about.

One cannot fully discuss the issue of religion in the public square without first addressing the fundamental question: What is the proper relationship between church and state? Mr. Madison and Mr. Jefferson thought the question so important that they debated it for a decade in the Virginia Legislature. Our Founding Fathers placed so much importance on the question of church and state that they chose to put their answer to that question not just anywhere, but in the first 16 words of the First Amendment of the Bill of Rights: "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In his letter to the Danbury Baptists of Connecticut in 1802, Mr. Jefferson said the intent of this constitutional principle was to build a wall of separation between church and state. Perhaps America's greatest single contribution to the world from our experiment in democracy has been the religious freedom and tolerance that have resulted from the principle of church/state separation. In fact, I would ask anyone to show me any nation where direct government funding or entanglement with religion has resulted in more religious freedom or tolerance than we have in America today.

As a person of faith, a lifelong Methodist, and a son-in-law of a Baptist minister, I thank God that we live in a Nation where our Founding Fathers had the wisdom to put religion and religious freedom on a pedestal far above the reach of politicians. Our Founding Fathers understood the lesson of human history that three things happen when Government and politicians get involved in religion: first, the rights of religious minorities are limited; second, politicians cannot withstand the temptation to use religion as a means to their own political ends; and, third, Government fund-

ing of churches, synagogues, and mosques ultimately harms houses of worship by undermining their independence and by creating a public impression that they are nothing more than a bureaucratic arm of the state. If anyone doubts that, simply look at church attendance on the Sabbath in European nations that fund their churches.

Perhaps this lesson of history, these three lessons are why I would warn religious leaders and people of all faiths to be cautious when any politician, me or you or anyone else, say, "I am from the Government and I am here to help you."

Mr. Chairman, as this Subcommittee and House committees move forward on the important question of the proper role between church and state—and I salute you for focusing on this issue—I would respectfully make three suggestions.

First, since the issue of religious freedom is so important to all Americans, and since our Founding Fathers debated this question for years and then chose to make church/state separation the first principle enunciated in the Bill of Rights, I hope this Subcommittee will hold a number of in-depth hearings on this issue, inviting legal, religious, and academic scholars from differing viewpoints. To do anything less in the House or Senate would be a disservice to the First Amendment and the religious freedom and tolerance it has protected so magnificently for over two centuries.

Second, this Committee's public notice said it will examine, and I quote, "Government discrimination against religious expression." In doing so, I hope you will have hearings on the implications of denying American citizens tax-funded jobs solely because of their religious faith. While I support many parts of President Bush's faith-based initiatives, I strongly disagree with the provisions that make it legal for hiring and firing decisions for public jobs to be based solely—solely—on one's religious faith. No American citizen should have to pass another citizen's private religious test to qualify for a tax-funded public job. That type of religious discrimination deserves this Committee's attention.

Also on the issue of discrimination, as a Christian I revere and try to live by those Commandments every day and do my best to teach them to our two young sons. But I hope you will address these questions regarding the Ten Commandments. Do we really want politicians and public officials to decide which specific religious doctrine or beliefs should and should not be prominently placed in public buildings, courthouses, and public schoolhouses?

Mr. Chairman, it is a Pandora's box. Either all groups, including religious supporters of Islamic militants, Wiccans, several hundred of which live in my district, the Church of the Creator, and others, be allowed to display their religious beliefs on public buildings or perhaps on the wall behind you, or we can follow the Chinese Government's model where politicians have the power to decide which religious doctrine is officially approved by the state and which is not.

Third, let's debate both sides of this vital and complicated issue of church/state separation with respect for those with differing viewpoints. I have great respect for Mr. Towey of the White House Office of Faith-Based Initiatives, and I am genuine about that respect. But I believe he went too far last week when he defined the

church/state debate as a "cultural war." Groups such as the Joint Baptist Committee, Methodists, and the American Jewish Committee are strong defenders of church/state separation. Are they guilty of fighting a cultural war against religious expression in the public place? I think not.

Even if you genuinely disagree with these religious groups' views, we should respect the fact that these people of faith believe what they are fighting for is to protect religious freedom from Government entanglement. I believe Mr. Towey owes many people of faith an apology for suggesting they are involved in perpetrating a cultural war, in effect, a religious war.

As we fight together against Osama bin Laden and the war on terrorism, let's leave the lexicon of war to our Army generals in Iraq and Afghanistan and keep it out of honest debates on religious freedom here at home. Our Nation doesn't deserve the kind of divisiveness that could be caused by putting religious debates in the context of being a war, cultural, religious, or otherwise.

This Committee, in announcing and naming this hearing, did not go so far as to describe this debate as a war, and I appreciate that and respect you for that. However, it did use phrases such as "hostility to religion" and "hostile religious expression." Perhaps there are some in this country that are hostile to religion, but not many of the people of great faith, of genuine faith, who will stand up in defense of the Establishment Clause and keeping Government out of our churches and out of our religious faith.

The debate, as I said, is not about who is on God's side and who is not. Religious critics were dead wrong when they attacked Mr. Madison and Mr. Jefferson two centuries ago and accused them of being anti-religion because of their belief in church/state separation. Let us not make that mistake again today.

In conclusion, the Bill of Rights has never been amended in over two centuries, especially when it comes to the first freedom, which we all revere—religious freedom. We should move carefully and thoughtfully before we tamper with a system of religious freedom and tolerance that is the model and hope of the world.

It would be ironic to have Americans preaching the principle of church/state separation in Iraq while not practicing it here at home. We should practice what we preach.

The American people and the issue of how to best protect religious freedom deserve a thoughtful, reasoned debate, and I thank the Chairman and the Members for allowing that debate to begin today.

[The prepared statement of Representative Edwards appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Congressman Edwards. I thank you for expressing your views, your strongly held views, and I hope that you will get a chance to stick around for the rest of this hearing because I think what you described, which would be a more or less comprehensive review, including testimony from legal scholars on this issue, would be just exactly what it is that you asked us to do. And certainly this hearing was not billed as asking whether people were for God or against God. Really, rather than the establishment concerns that you addressed, we are

also looking at recognition of religious liberty interests, and that is the primary thrust.

But let me just ask you to clarify something you mentioned. You said—well, let me ask: You do not support the President's faith-based initiative which would allow the use of Government funds on a neutral basis to religious organizations that provide social services, say, to the homeless or people who are addicted to drugs and that sort of thing? Could you clarify your position?

Representative EDWARDS. Yes, Mr. Chairman. For years, before the President's faith-based initiative, the Federal Government has been providing funding for religious faith-based groups that do good social work. This has been going on for decades. Ask the Catholic Charities about that, and Lutheran Social Services. But they did so under three conditions that I think are proper and constitutional requirements.

First, you couldn't send that money directly to a house of worship. I do disagree when the Department of Housing and Urban Development wanted to actually have direct Federal tax funding of houses of worship, not faith-based groups but literally the houses of worship themselves. If we bring Government dollars into our churches, synagogues, mosques, and houses of worship, guess what follows? Government regulations. We don't need Government auditors and regulators running through the halls of our houses of worship.

Secondly, the law, longstanding for decades, allowing faith-based funding said that you can't proselytize with tax dollars. I believe the Bush administration has gone on record as saying it agrees with that. I shouldn't be able to take your tax dollars and force my religion on somebody else with those dollars.

The third provision which the President's proposal is trying to amend is under longstanding law, you have not been able to discriminate in job hiring using tax dollars based solely on someone's personal religious faith. For example, if I get a $5 million job training grant from the Federal Government, I don't think for job training positions I should be able to give Members of this Committee, if you applied to me for a job, paid for by the taxpayers, give you a private religious test and say, Mr. Cornyn, Mr. Sessions, Mr. Feingold, you did real well on Questions 1 through 16, but I really don't like your answer to my religious question, number 17, so I am not going to hire you or I might fire you from this federally funded job.

I think the Federal Government doesn't need to be in the business of subsidizing discrimination based on religion. We can continue faith-based work. I reject the notion we have to discriminate against American citizens, make him or her choose between his or her job and his or her faith simply to qualify for a secular, federally funded job. On that point, I strongly disagree with that particular part, an important part of the faith-based initiatives.

Chairman CORNYN. Not to dwell too much on this, but one last question in that regard. Just to use a hypothetical, because it helps maybe clarify it a little bit, if you have a church, let's say, that provides a soup kitchen to feed the homeless and they apply on a competitive basis for some sort of grant that the Government might supply on a neutral basis, no proselytizing going on, just feeding

hungry people, but they insist on the right to be able to hire people who only subscribe to that particular religious organization's faith, you would object to that?

Representative EDWARDS. Yes, I would, because I don't see why in order to be qualified to serve soup at a federally funded, tax-funded program one must follow someone else's religious faith. We all understand why Baptist Church can use its own money to hire a Baptist pastor or a Jewish synagogue can hire a Jewish rabbi. But when you are using tax dollars, public dollars, I think to make those jobs dependent upon my passing your private religious test or your passing my religious test is wrong. And if that is not religious discrimination, to force you to choose between your faith and your job, I don't know what is.

Chairman CORNYN. Thank you very much.

Representative EDWARDS. Thank you, Mr. Chairman.

Chairman CORNYN. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, we often don't ask questions of Members of Congress at the beginning, but I will tell you, I am glad you did, Mr. Chairman, because what Representative Edwards just demonstrated is that he is, in my view, the preeminent force in our entire Congress for trying to get this faith-based thing right. It was his efforts, when he came to see us in the Senate, that brought us together to pass a Senate version of the bill that actually does properly balance the concerns about making sure we help our faith-based institutions and respecting the Constitution.

So I want to thank you for that wonderful leadership that you have shown throughout the Congress, and we know you have very important responsibilities in the House, and we thank you for the time that you have given us already today. I understand you probably cannot stay for the rest of the hearing, but obviously we will make sure you get a copy of the proceedings. And I just want to say personally how much I appreciate your leadership on these issues, Representative Edwards.

Representative EDWARDS. Senator, thank you very much, and I am going to stay. I can't imagine anything more important, a more important issue being debated in Congress today. And, Mr. Chairman, I thank you.

Let me just say, too, I didn't suggest and didn't want to even imply that you were saying this is a choice of who is for God and who is against God. But I do think we need to be careful, when we talk about hostility against religion in the public place, that we not suggest that everyone who might disagree with Judge Moore, everyone who might disagree with some of us in this room, somehow is hostile to religion. In 1800, some attacked Mr. Jefferson for his belief in church/state separation by saying, and I quote—his election in 1800, "The effects would be to destroy religion, introduce immorality, and loosen all the bonds of society." That was said about Mr. Jefferson over 200 years ago simply because he believed in the principle of church/state separation as a way to accomplish religious liberty, which that is a goal we all want, religious liberty. I hope we will be respectful, both sides, frankly, as we discuss this terribly important issue.

Thank you, Mr. Chairman.

Chairman CORNYN. Thank you very much. I appreciate your being here.

Senator FEINGOLD. Mr. Chairman, I ask unanimous consent that a statement from Senator Leahy, the Ranking Member of the full Committee, be entered into the record.

Chairman CORNYN. Certainly. Without objection.

We will now proceed to panel number two, and I would like to ask the members of the second panel to take their seats at the witness table.

We are pleased to have a panel of citizens and representatives of citizens' groups here with us today to discuss their own experiences in the area of religious expression in the public square. I will introduce the panel, and then I will ask each of them to give an opening statement.

Nashala Hearn is a middle school student from Muskogee, Oklahoma. She traveled here with her father, Eyvine Hearn. In my written remarks, I briefly summarized the hostility that she faced because of her adherence to her Muslim faith. She was suspended for wearing her hijab to school in accordance with the dictates of her faith. From what I have gathered, it was precisely because of the pervasive Government hostility to faith that we have seen in our legal culture in general that this particular school thought it could get away with refusing to respect this brave young girl's sincerely held religious beliefs. And only after the Justice Department intervened did the school finally back down and settle the case out of court just last month.

Steven Rosenauer is here with us from Bradenton, Florida. Steven and his wife, Carol, are members of the Jewish faith. In May 2003, they and their son were invited to a school board meeting so their son could be honored for his academic achievements. The Chairman of the board began that meeting by asking everyone to stand for a recitation of the Lord's Prayer. After Mr. Rosenauer filed suit, the parties reached an agreement which I believe is a reasonable resolution under our First Amendment. Specifically, the agreement permits the board to open its meetings with a nonsectarian invocation.

William, better known as "Barney," Clark is a citizen of Balch Springs, a wonderful small town in my home State of Texas, just outside of Dallas. Mr. Clark is a proud World War II vet, and he and his wife were regular attendees at the Balch Springs Senior Center. I might add that while Barney is here, he has got an opportunity, I hope, to visit the World War II memorial.

Mr. CLARK. I did.

Chairman CORNYN. And we are glad you had that chance while you are here as well.

As I mentioned in my written remarks, that city-owned senior center, that is, Balch Springs Senior Center, barred a group of seniors, including Mr. Clark, from privately engaging in prayer and singing religious hymns. After the intervention of public interest lawyers from the Liberty Legal Institute and, once again, the support of the Justice Department, the city backed down.

J. Brent Walker is Executive Director of the Baptist Joint Committee on Public Affairs here in Washington, D.C. He is an ordained minister as well as an attorney. In addition, he serves as

an adjunct professor at Georgetown University Law Center. He formerly served as the Baptist Joint Committee's general counsel, and he has testified before Congress on a number of occasions. We welcome him again here today.

Judge Roy S. Moore is the former Chief Justice of the Supreme Court of Alabama. He is a graduate of the University of Alabama School of Law and the United States Military Academy at West Point. He has served as a captain in the Military Police Corps of the United States Army and as a company commander in Vietnam. He has also served as a deputy district attorney and a circuit judge in Gadsden, Alabama, before he was elected to the office of Chief Justice in November of 2000. He received national attention when his defense of the placement of the Ten Commandments in public buildings eventually led to his forced departure from the court.

And, finally, Kelly Shackelford, like Mr. Clark, also hails from my home State of Texas. Mr. Shackelford is the chief counsel for the Liberty Legal Institute. In that capacity, he represented the senior citizens involved in the controversy at the Balch Springs Senior Center. He has also represented a number of other citizens who faced hostility for their private religious expressions. Mr. Shackelford formed the Liberty Legal Institute to fight for religious liberty and protect freedoms in the courts in Texas and nationwide. He has argued both before the United States Supreme Court and testified before Congress and the Texas Legislature. He is also an adjunct professor of law at the University of Texas Law School.

I would like to thank each of you for being here today, and I know many of you traveled a long distance to be here. And I am sorry to tell you that while I want to hear an opening statement, the Committee wants to hear an opening statement from each of you, I am going to have to ask you to keep that opening statement to about 5 minutes, and I will enforce that with this gavel they left for me up here. Then we will have an opportunity to ask some questions and hear from the next panel of witnesses that follow you.

Of course, we will accept longer written remarks for the record, and I will take this opportunity to mention that we will leave the record open until 5:00 p.m. next Tuesday, June the 15th, for any other Members of the Committee to submit additional documents into the record and to ask questions in writing of any of the parties.

At this time we will hear from the first witness, and, Nashala, you have a microphone there in front of you, and you just need to—

Senator SESSIONS. Mr. Chairman, I might say a word of welcome to my—

Chairman CORNYN. Senator Sessions, certainly.

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Senator SESSIONS. Judge Moore, it is great to have you here. He is from my wife's home town of Gadsden. As Attorney General of Alabama, I had the pleasure of working with you.

And I would just say this, Mr. Chairman: Judge Moore did not come to the question of church/state issues lightly. He has read virtually every document of our Founding Fathers. He has analyzed

carefully what they said, how the Constitution was adopted, and he has developed some ideas about it. And, unfortunately, that ran into conflict with Federal courts, and he stood by those beliefs. He is a man of integrity and conviction and was willing and, in fact, gave up his office—not a rich man, a man who served his State and his country in Vietnam. He gave up his office in adherence to what he believed was correct. And I think we owe him great respect. There are two aspects of our Constitution. One is the Establishment Clause that prohibits the establishment of a religion, and the other one protects the free exercise thereof. And I think we do have issues here of significance to discuss, and I like the way the discussion is going so far. I think it is important. And, Judge Moore, we are glad you are here. I wish you were still on the court. I am sorry things worked out the way they did. God bless you.

Chairman CORNYN. Thank you, Senator Sessions.

Nashala, we will be glad to hear from you first, so if you will speak into that microphone in front of you and loud enough so we can all hear you, we would appreciate any statement you would like to make.

**STATEMENT OF NASHALA HEARN, MUSKOGEE, OKLAHOMA**

Miss HEARN. Thank you, Senator Cornyn. It is an honor to be here. And thank you, Senator Feingold, too.

My name is Nashala Hearn. I am 12 years old, and I live in Muskogee, Oklahoma, with my father—who is here with me today—and my mother, my brother, and my sister. I attend the Ben Franklin Science Academy, which is a public elementary school in my home town.

On October 1, 2003, I was suspended for 3 days from the Muskogee Public Schools for wearing my hijab—which is a headscarf required by my religion, Islam.

I didn't know it was going to be a problem because on August 18, 2003, my first day of school, I explained to my homeroom teacher that I am a Muslim and I wear a hijab, and that I also pray between 1:00 and 1:30. She said that was fine and that she had a room for me to pray in.

From that day forward, I received compliments from other kids as well as school officials.

But my problems started on September 11, 2003. I was in the breakfast line when my teacher came up to me and said that after I was done eating to call my parents because my hijab looks like a bandanna or a handkerchief and that I wasn't allowed to wear it.

So after I was finished, I went to the office.

Ms. Walker had already called my parents. When my parents got there, they were very upset. The principal said it was a bandanna and I had to change it or go home.

And this is how the battle of being obedient to God by wearing my hijab to be modest in Islam versus the school dress code policy began.

I continued to wear my hijab because it would be against my religion not to.

So like I said before, I was suspended from school on October 1st for 3 days. When I came back to school on October 7th, I was suspended again. This time it was for 5 days.

I was able to go back to school after that until the problem was fixed.

This experience has been very stressful, very depressing, and humiliating.

By the grace of God and thanks to the DOJ, the Rutherford Institute, and my lawyer, Ms. Farish, the problem no longer exists in the Muskogee public schools. The school agreed to let me and other kids wear our religious clothing.

Thank you for listening and thank you very much for having me here today. Praise to Allah.

[The prepared statement of Miss Hearn appears as a submission for the record.]

Chairman CORNYN. Thank you, Nashala, for your statement, and we appreciate your courage and your presence here today, and also your father for making it possible for you to be here.

Mr. Rosenauer, we would be glad to hear any opening statement you would care to make, sir.

**STATEMENT OF STEVEN ROSENAUER, BRADENTON, FLORIDA**

Mr. ROSENAUER. Good afternoon. My name is Steven Rosenauer, and I live with my wife and two children in Bradenton, Florida. At the request of this Committee, I am here to testify about the important issue of religious liberty in America as it has recently affected my family.

Both my children attend public school in Manatee County, where we live. Last spring, my wife and I were very proud when we were invited to the school board meeting on May 5th, along with my son Joshua, so that the board could recognize and honor him for winning first place in several events at the Technology Student Association State Competition. Several other students were at the meeting so that they could also be recognized for similar achievements.

As my wife and son and I sat in the audience, the school board's Chair called the meeting to order. Then, to my surprise, she told everyone in the audience to "please stand for the Lord's Prayer" and the Pledge of Allegiance. The board members then stood, bowed their heads, and led most of the audience in reciting the Lord's Prayer, a well-known Christian prayer considered by most Christians to be the prayer taught by Jesus to his disciples. My family is Jewish, and we were shocked and felt uncomfortable and excluded by these actions of our community's elected officials at an official school board meeting. On our way home, my son, my wife, and I were all upset. As I explained in a letter I wrote that same night to the school board Chair, "I was very offended when you had everyone present rise for a ceremony that I consider against my religion."

For the next several months, board members continued to lead the Lord's Prayer at board meetings, despite my letter as well as letters from People for the American Way Foundation, which had agreed to help me and my family. Some community members made disturbing statements, such as one urging the board to "stand on Jesus Christ" and not to bend to "foreign gods." Some board mem-

bers strongly defended their actions as permissible religious expressions of their faith. One went so far as to state that the Supreme Court isn't "the eternal supreme court," and that perhaps he would have to be taken out in handcuffs 1 day. But even Pat Robertson's American Center for Law and Justice recognized that the board's practice was unconstitutional and that the only type of invocation that can possibly be legal would have to be truly nonsectarian and clearly voluntary. As the Sarasota Herald Tribune explained, "Manatee is home to a diverse mix of religious faiths. It's chauvinistic for the board to impose a distinctly Christian prayer on everyone attending its meetings. Doing so sends a message, intentional or not, that citizens who don't share the board's faith are viewed in a lesser light...Out of respect for the community's religious diversity—not to mention the Constitution—the board should drop the prayer and end this controversy."

I became hopeful in August when the board adopted guidelines for its meetings to begin with nonsectarian invocations. But the board repeatedly violated those guidelines as ministers invited by the board led public, sectarian prayer, including praying in the name of Jesus, despite repeated letters from us. In February, after trying for more than 6 months to resolve the issue, we, with the pro bono help of People for the American Way and the law firm of Hunton and Williams, filed suit in Federal court.

For a while—excuse me.

Chairman CORNYN. It is all right. Take your time.

Mr. ROSENAUER. For a while, things got even worse. We received anonymous threatening phone calls, like the one telling us we should move out of the country if "we didn't like the way they do things here," and the call that threatened, "We know where you Jews live and if you don't drop the lawsuit, there will be trouble." During the Jewish holiday of Passover in April, someone vandalized our home by throwing red oil-based paint on the front door and garage door of our house and our truck outside. It reminded us all too chillingly of what has happened to Jews and other religious minorities in other countries where they don't have the religious freedom and separation of church and state that are the foundation of our great country. My family believes that some board members and others in the community helped foster the atmosphere where these types of actions occurred when they made public statements of intolerance and their own disdain for the courts.

Both newspapers in our area have strongly supported our position, and I am pleased to report that just last week, the court approved a settlement that we reached with the board, which includes an enforceable consent decree calling for the board to make sure that only truly nonsectarian prayer can be used to open board meetings.

We are hopeful that this situation is now behind us. But it has reminded us of the importance of true religious liberty in America and the dangerous consequences of allowing improper Government promotion of religion and eroding the separation of church and state. The Constitution protects the religious liberty of all Americans, not just those of one faith. My family's situation has high-

lighted the importance of our Federal courts in protecting that fundamental principle.

Thank you very much.

[The prepared statement of Mr. Rosenauer appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Mr. Rosenauer, for being here and for your testimony and sharing that story with us. I know it wasn't easy, but it is important that we hear it.

Mr. Clark, we would be glad to hear any opening statement that you would care to make.

**STATEMENT OF WILLIAM "BARNEY" CLARK, BALCH SPRINGS, TEXAS**

Mr. CLARK. Chairman Cornyn, Ranking Member Mr. Feingold, and Members of the Committee, thank you for the privilege you gave me to come and testify before you today.

Chairman CORNYN. Mr. Clark, you may want to pull that microphone just a little bit closer to you so we can make sure not to miss a word.

Mr. CLARK. My name is Barney Clark. I am a member of the Balch Springs Senior Center, and my wife and I have been members for 10 years. We started our 11th year the 1st of May.

it has always been a pleasure, a fun place to go, people your own age, things to do together. And it has really been a pleasure. But in the last 6 to 8 months, it has all changed.

We have been singing religious songs, listening to inspirational messages, and praying over food, they tell me, for 20 years. I know this went on for 10 years that I have been there. But every Monday, Brother Barton comes in and gives an inspirational message. He doesn't preach a sermon. He gives an inspirational message right out of the Bible. He has no altar call. He doesn't take no offering. He prays for the sick. He visits them in the hospital. He has even buried two or three people that passed on. He is a wonderful man.

Back in August 2003, after we had our gospel singing and inspiration, Ms. Deborah, the director, came and told us that we cannot have no more gospel songs, we cannot stand up and pray over our food, we can't have Brother Barton to come in and preach no more, bring inspiration. This message came from the city manager and was passed down to her by the city attorney. This was the first time that we was told that we couldn't do this that had been going on for 20 years.

I don't mind telling you, we was in limbo for 2 or 3 days around that. We didn't know what we was going to do, nothing. We prayed about it. We turned it over to the Lord, and we prayed for the people that was bringing it on us.

Lo and behold, we got a call out of the clear blue sky from the Liberty Legal Institute. They said, "They are treating you wrong. If you want a representative, we will represent you, no cost to you." That was our first prayer that was answered. If you wanted to see a bunch of smiling faces, you should have seen those people over there that day. They said, "It is not right the way they are treating you, it is against your religious freedom, your freedom of speech,

and it is just not right." They said, "If you want us to represent you, we will be out there Monday to talk to you."

Monday they came out. We got 16 people. We had 40 or 50 people there, but some reason or the other, they were reluctant about standing up, standing up for their rights. But we got 16 up, and they had television people out, the news people, and they gave us wonderful coverage. It seemed like every one of them—in fact, the mayor of Balch Springs said, "I cannot believe the publicity this is getting," just this little bunch of seniors. But they rallied from everywhere. I got calls from Canada. I got calls from California. There was even a call that come in from England, from Florida, and all over Texas, all saying, "You are doing good. We are praying for you. Keep up the good work."

The people signed up, the petition for the lawyers to represent us. They said, "We will go to court if we have to." Well, the lawyers sent a demand letter to the center, sent it to the council. They refused to answer it. They wouldn't talk to us. My wife personally called each councilman to come over and talk it over. They wouldn't come talk with us. Two councilmen come over and talked to us and said they was for us, they was favorable. They said, "It is not right, but there is nothing we can do because every time we speak up, these other four councilmen votes us down."

Well, there we go again. In the meantime, Mr. Normal Moorhead, the director of the Dallas Area Agency of Aging, stated that our food program would be in jeopardy if we won. I said, "You win and you lose your food? That don't sound right." Well, Mr. Sasser from the legal institution, he got a chuckle out of it, and he said, "They can't do that." He said, "Don't worry about it." Well, we didn't. We went on.

In the meantime, the Justice Department come down, and they was nosing around, you might say, talking and asking questions. And the insurance company from Balch Springs got in it, they had become involved. Well, the insurance man seemed like a pretty decent fellow, and he demanded—I don't know whether he demanded, but they got him to go to mediation. So we went to mediation. We talked back and forth. Of course, they was in one room, we was in another. Then lunchtime came. They come and took orders for sandwiches. We all ate our sandwiches. The mediator come in, he said, "Gentlemen, I don't know what to tell you. They walked out." We said, "What do you mean they walked out? They called the meeting." He said, "They walked out grumbling, something about the wrong sandwiches."

Well, I had the wrong sandwich. My name was on it. Whoever took the order got them mixed up. It was a good sandwich. I ate it.

[Laughter.]

Mr. CLARK. But they refused to eat theirs and walked out of the meeting.

The next thing, when the Justice Department really got into details on it, they threw in the towel. They said, "Give seniors back their rights." All right. Everything, the seniors, we could sing, we could pray, preach, whatever we want to do, and religious, we can, except Mrs. McDaniel, our director, came from Mr. Moorhead's office—I can't say he give the order, but it came from his office. She

can have nothing to do with religion whatsoever. The preacher is a personal friend of hers. He married her and her husband there at the center. If he comes into the building, she has to leave and go into her office. He can go in there and talk to her, but she can't talk to him in the main building.

Now, something is wrong when somebody can tell you if you take this job, you give up your religion, you can't have it. Now, there is something wrong with that. But it happened.

Now, in the meantime, we got another letter from Mr. Moorhead that said our food program—we are not happy with what is going on, our food program will be in jeopardy again.

Mr. Sasser called me and said, "We will have a press meeting Monday"—I believe it was a Monday evening at 1 o'clock, said, "Get all the people together." We assembled—well, we was all at the center that day. About, I would say, 11:00, 11:30, he called me. He had been over talking to Mr. Moorhead. He said, "Forget about it." He said, "He's throwed in the towel. He's decided that you will get your food." Of course, he assured us all along that we would. So that took care of that.

But would you believe, Senator, that the mayor come over and told me personally—and other people was there—that I could go over in the corner if I wanted to and pray. He couldn't tell me I could or I couldn't. I told him, "My Bible says, 'Profess me publicly.' I will not go in the corner and pray like a criminal, and if you want to carry me to jail, carry me to jail." That is so it be. And we, the people involved in the lawsuit, got out in the center of the room and held hands and prayed for our food.

In closing, I want to say that I am a veteran from World War II. I put my life on the line for what I believe in. And if Mr. Truman hadn't dropped the bomb when he did, I believe that I would have paid the price, the supreme price, for what I believe in. And I just do not believe that is right for anybody to come up and tell you that you can't pray, preach, or listen to religion.

And, in closing, I would like to say to each one of you all, the Constitution guarantees each American the right for peaceful assembly. Now, I ask you, what could be more peaceful than a bunch of old folks sitting around singing good old gospel songs that this country was founded on?

[Laughter.]

Mr. CLARK. And, with that, I thank you from the bottom of my heart for letting me come up here and state my case.

[The prepared statement of Mr. Clark appears as a submission for the record.]

Chairman CORNYN. Thank you, Mr. Clark. We appreciate your testimony.

Mr. Walker, we would be delighted to hear from you.

**STATEMENT OF J. BRENT WALKER, EXECUTIVE DIRECTOR, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, WASHINGTON, D.C.**

Rev. WALKER. Thank you, Mr. Chairman and Members of the Subcommittee. I don't thank you, however, for putting me after Mr. Clark on the dais.

[Laughter.]

Rev. WALKER. For 68 years, the Baptist Joint Committee has pursued what I think is a well-balanced, sensibly centrist approach to church/state issues. We take seriously both religion clauses in the First Amendment as essential guarantors of our God-given religious liberty. It is, indeed, our "first freedom."

The wise architects of our republic fashioned twin constitutional pillars—no establishment and free exercise—and they placed them first in the Bill of Rights to protect what many of them believed to be God-given rights and to buttress the wall of separation that is so critical to ensuring our religious liberty.

The Establishment Clause is designed to keep Government from promoting or helping religion. The Free Exercise Clause is intended to prevent Government from discouraging or hurting religion. And the two, taken together, call for a neutrality on the part of Government and how it relates to religion. Government should accommodate religion but without advancing it, protect religion but without promoting it, lift burdens on the exercise of religion without extending religion an impermissible benefit.

The requirement of keeping church and state separate, however, does not call for a divorce of religion from politics. The metaphorical wall of separation between church and state does not block metaphysical assumptions from playing a role in public life. Religious people have as much right as anybody else to seek to vend their convictions in the marketplace of ideas and, within some limits, to allow their religious ethics to influence public policy by speaking out and organizing politically and even running for office.

While religious expression by public officials is ordinarily permitted, there are, I think, constitutional limits. With all respect to my co-witness on this panel, the Ten Commandments case out of Alabama illustrates a Government official expressing his own religious views that clearly, in my mind, crossed the constitutional boundary. Far from a generic recognition of a supreme being, Hon. Chief Justice, one, singled out one favored religious tradition; two, he chose the preferred Scripture passage; and, three, he displayed it in a way that created nothing less than a religious shrine. And while so doing, he made theological judgments throughout. Which Commandments, Deuteronomy 5 or Exodus 20? Is it the English Old Testament or the Hebrew Bible or maybe the Greek Septuagint? Is it a Catholic or Protestant one? Which translation—King James, New International, Revised Standard? They all differ in form and style and theological nuance. These are fundamentally religious decisions that Government officials are ill-suited to make.

We must always keep in mind the difference between Government speech endorsing religion, which the Establishment Clause prohibits, and private religious speech, which the Constitution protects. Religious speech by private citizens, even in public places, is not forbidden. It is protected and commonly practiced. And there are lots of ways in which the Ten Commandments, for example, can be expressed in public without the helping hand of Government. They can be posted in front of every church and every synagogue in the land, in full public view. They can be displayed even on public property if that property is a free speech forum. One can hold up a sign, Exodus 20 or Deuteronomy 5, instead of or in addition to John 3:16 in the end zones of televised football games. And

taking a lesson from the prophet Jeremiah, we can write the Commandments o our hearts instead of on stone, thereby providing a living witness to those teachings.

In sum, the question is not whether the Ten Commandments embodied the right teachings. The question, rather, is: Who is the right teacher—politicians or parents, public officials of religious leaders, judges or families?

As a minister, I can think of little better than for everyone to read and obey the Ten Commandments, but as a lawyer, I can think of little worse than for Government officials to tell us to do it.

Finally, even public officials are not prohibited from considering the Ten Commandments in the proper context. For example, schools may teach about the Ten Commandments in Bible as literature courses. Schools can instruct students in the ethical precepts embodied in the Commandments in a proper character education course. And the Commandments can be depicted as an integral part of a historic educational exhibit, such as on the frieze across the street in the United States Supreme Court courtroom.

We must catch the vision of our Nation's Founders: religious freedom for all, unaided and unhindered by Government. We must commit ourselves to protecting religious expression in public places without allowing Government officials to promote religion or to pick and choose among religions.

Two Founders, in conclusion, I want to refer this Committee's attention to. Two Founders who succinctly expressed this aspiration in a way that inspires me every day: Daniel Carroll, a Catholic from Maryland, captured the pith of the free exercise principle when he said, "The rights of conscience are of particular delicacy and will little bear even the gentlest touch of Government's hand." And on the other side of the Potomac, Virginia Baptist John Leland expressed the rationale for the no establishment principle when he exclaimed, "The fondness of magistrates to foster Christianity has done it more harm than all the persecutions ever did."

The stirring words of Carroll and Leland call for Government neutrality in religion and highlight the importance of protecting the rights of conscience of every human being, and they posit, in my judgment, a well-balanced view of a free church in a free state.

Thank you.

[The prepared statement of Rev. Walker appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Mr. Walker, for being here and for that statement.

Judge Moore, we would be delighted to hear from you now.

**STATEMENT OF HON. ROY S. MOORE, FORMER CHIEF JUSTICE, SUPREME COURT OF ALABAMA, BIRMINGHAM, ALABAMA**

Justice MOORE. Thank you, Senator Corny and Senator Feingold. I am glad to be here and argue before this Committee my position. I thank you for the opportunity to appear, and I want to especially appreciate Senator Sessions and Senator Shelby, two of the finest Senators I think Alabama has ever had, and we are very proud in our State of these Senators.

I realize that my testimony is long, very factual, and I request that it be entered into the record.

Chairman CORNYN. Without objection.

Justice MOORE. I want to first agree with Representative Edwards on one thing, at least. It is not between those who believe in God and those who do not believe in God. It is between those who understand the First Amendment and those who do not. The issue in all these is the acknowledgment of that God upon which this Nation was founded. The issue in my case—and disagreeing with Mr. Walker since he knows so much about my case—was not the Ten Commandments. It was about the acknowledgment of God.

The court judge in that case said this: "The issue is: Can the state acknowledge God?" He said, "I think you said it. And I think perhaps in many ways I doubt the plaintiffs will disagree with you on that." You see, we have got to understand what the issue is. I have heard the word "religious" or "religion" used over a thousand times here today. And who can define that word? Well, the Supreme Court did define that word in 1878 and 1890 and attached the true definition to the case of *Everson* v. *Board of Education* in 1947. "Religion" was used over 150 times in Judge Myron Thompson's opinion. Do you think he could define the word? He said that the court lacks the expertise to formulate its own definition of religion for First Amendment purposes. In another section, he said, "Indeed, it is unwise and even dangerous to put forth as a matter of law one definition of religion for First Amendment purposes."

You see, when you can't define a word as a judge, you can't interpret the law. The First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." That part of that First Amendment was designed to allow the States and to allow the people of this country to acknowledge God according to the dictates of their conscience. As far back as 1776, we were declared to be one Nation under God in the Declaration of Independence because it was the laws of nature and nature's God who gave us that right.

Now, many take the secular position that they put themselves into being neutral toward religion. Indeed, God is the only one neutral to religion because He gave us that freedom of conscience to believe as we must. Therefore, it is actually very imperative that we recognize the issue in this case, and the issue in the case is the Government's interference with the right of the people of these States to acknowledge God. Every State in this Union acknowledges God in its Constitution. I have been speaking—I have spoken to about 25 States since November. Every State acknowledges God. If you can give me not that doesn't, I will take it.

I heard earlier that God was meant to be separated from our Constitution. That certainly wasn't the case. James Madison, the chief architect of the Constitution, in Federalist Paper No. 37, on January 11, 1788, said, "It is impossible for the man of pious reflection to perceiving it, a finger of that almighty hand which has been so frequently and singularly extended our relief in the critical stages of the Revolution." In Federalist 37, on January 23, 1788, in addressing Article VII of the Constitution, he said, "Some may wonder why nine States can adopt the Constitution when 13 States have already adopted the Articles of Confederation." He said, "The

first question can be answered at once, by recurring to the absolute necessity of the case, to the great principle of self-preservation, to the transcendent law of nature and of nature's God which declares that the safety and happiness of society are the objects to which all political institutions aim and to which all such institutions must be sacrificed."

We have simply confused today, Senator, the acknowledgment of God with religion. In 1954, when the legislature of this country, the Congress, put "under God" in the Pledge, they were not confused. They said this: "It should be pointed out that the adoption of this legislation in no way runs contrary to the vision of the First Amendment to the United States Constitution. This is not an act establishing a religion or one interfering with the free exercise of religion. A distinction must be made between the existence of religion as an institution and the belief in the sovereignty of God."

They also said one other thing that is pertinent in this hearing. They said, "At this moment of our history, the principles underlying our American Government and American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by him with certain inalienable rights which no civil authority can usurp. The inclusion of God in our Pledge, therefore, would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator."

For those who would wonder what God this is, it was the God of the Holy Scriptures. It was the God referenced in Benjamin Franklin's address before the Constitutional Convention. I happen to have that address. I happen to have it in the—right out of the Congressional Records of the Senate in which they discussed—I am sorry, the House of Representatives, in which they discussed his address. He used these words. He said, "We have not hitherto thought of humbly applying to the Father of Lights to illuminate our understanding." "The Father of Lights" comes right out of Matthew. He referred to, "A sparrow cannot fall to the ground without His notice"—right out of Matthew—I'm sorry. "Father of Lights" comes out of James. "A sparrow cannot fall to the ground," out of Matthew. "Except the Lord build a house, they labor in vain that built it," under Proverbs. And the builders of Babel under another section of Scripture. He certainly knew which God they worshipped.

But it is important for everybody in this room to realize that does not discriminate against anybody else's faith. You see, that God gave us freedom of conscience, the freedom to believe as we wish. It would allow such things as wearing scarfs. It would allow such things as prayers, with or without Jesus' name. It is that God who gives us the freedom to worship God according to the dictates of conscience.

Joseph Story in his commentaries on the Constitution in 1833 said, "The rights of conscience are indeed beyond the reach of human power. They are given by God and cannot be encroached

upon by any human authority without a criminal disobedience of precepts of natural as well as of revealed religion."

Let me just quote one thing from President Ronald Reagan, spoken to the Alabama Legislature on March 15, 1982: "Standing up for America also means standing up for the God Who has so blessed our land. I believe this country hungers for a spiritual revival. I believe it longs to see traditional values reflected in public policy again. To those who cite the First Amendment as reason for excluding God from more and more of our institutions and everyday life, may I just say: The First Amendment of the Constitution was not written to protect the people of this country from religious values; it was written to protect religious values from government tyranny."

That statement is as true today as it was then.

I believe in separation of church and state quite strongly, but separation of church and state does not separate this country, it never has and never will, from God. The First Amendment to the United States Constitution's only purpose was to allow us to worship God. That was the first act, very act of the Congress that formed the words. They said that—they appointed a Committee to wait upon the President, directed the Committee to wait upon the President and request that he recommend to the people a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many and singular favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitutional government for safety and happiness. Eight days later, George Washington did exactly that in his first Presidential Proclamation, when he said, "Whereas, it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore his protection and favor."

Just like in the court proceeding, the first thing this Committee needs to do, Senator, is to clarify the issue. Can we acknowledge God? Certainly we can. That is all that was done in Alabama. That is all that the court said was done. But he said because we acknowledge the Judeo-Christian God, we could not do it. Right now in Alabama sits a display of the Ten Commandments, written out, put there by eight Justices, because they did it the, quote-unquote, "right way." What is the right way? According to the ACLU, Southern Poverty Law Center, and Americans United for Separation of Church and State, and the courts, it is to surround it with historical artifacts so that it reduces to past tense, so that God is no longer relevant.

My monument sit in a closet because it says—it is an acknowledgment of that sovereignty of God upon which this Nation was founded. The difference between those two monuments is one that caused me to lose my job. The other is for political purposes and does not acknowledge God.

I thank you for the opportunity to speak today, sir.

[The prepared statement of Justice Moore appears as a submission for the record.]

Chairman CORNYN. Thank you, Judge Moore.

Mr. Shackelford, we would be happy to hear your opening statement.

**STATEMENT OF KELLY SHACKELFORD, CHIEF COUNSEL, LIBERTY LEGAL INSTITUTE, PLANO, TEXAS**

Mr. SHACKELFORD. Thank you, Chairman Cornyn, Ranking Member Feingold, Senator Sessions. First, I just want to thank you for the privilege, the opportunity to be requested to speak today on the subject of the current hostilities to religious freedom. I respectfully request that the entirety of my personal statement be made part of the record of today's hearing.

Chairman CORNYN. Without objection.

Mr. SHACKELFORD. Unfortunately, we don't have to look to Canada and their recent passage of a hate speech law, which actually makes it a crime now to read certain sections of the Bible aloud, in order to find outrageous violations of religious freedom. We, unfortunately, have our own problems here in the U.S.

While I have been an adjunct professor of law teaching religious liberties at the University of Texas School of Law since 1994, I speak to you today as chief counsel of the Liberty Legal Institute. I have spent the past 15 years in specifically religious freedoms constitutional cases, and I have overseen hundreds of these types of cases. And let me assure you, the hostility that we are talking about is very real. We see it every day. There are simply those in this country who think that they are actually doing the country a service by removing references to our religious history and heritage from public and reducing and limiting, restricting religious expression in the public arena. And, unfortunately, these people are having great success.

Ten Commandments displays are being removed by court orders across the country. "Under God" is being challenged. In fact, they wanted the Ninth Circuit in our Pledge. Cities are having to remove all their religious symbols from their city seals. As you mentioned, just recently the City of Los Angeles, I think, has agreed to do that now after pressure. Churches and synagogues are being banned from entire communities, and children are being told in case after case after case that their religious expression is prohibited in school.

The atmosphere and hostility is out there.

In the short time I have I just want to share a few of our cases to provide an example of what is going on out there. You have already heard from one of our clients, Barney Clark. Actually, it is probably the most enjoyable clients I have ever had, senior citizens there from Balch Springs. In Balch Springs they were told they could no longer pray over their meal, they could no longer sing gospel songs. They could no longer have one of their own members talk about the Bible at the senior center.

We sent a letter. We tried to resolve this amicably, but these were not uninformed people. Their attorney, after looking at the law, decided the this could not be allowed. A government agency sent them a letter stating that if this continued, their funds for their meals would be taken away. So the idea that these are little isolated incidents, in addition to the situations we see day after day after day, are borne out by the fact that even attorneys who you would think, being through law school, could figure this thing out, are confused over and over again. They were shocked. Only after an extensive lawsuit over months of time, and only after over

$80,000 fees were donated for these seniors, were they able to rectify this situation, and in part, it was also because the United States Department of Justice intervened.

In *Barrow* v. *Greenville*, ISD, another one of our current cases, we have a teacher, Karen Barrow, who waited 9 years to be an assistant principal. When a job opened up she was told by the superintendent that she could only have the job if she agreed to remove her children from the private Christian school where they attended. When she said she could not do that, she was informed that she had no future in the district. In the depositions taken in this lawsuit, superintendent after superintendent testified that this is what superintendents across the State did as a matter of customary policy.

Again, this lawsuit, after over a million dollars in attorneys fees having been donated on behalf of this one teacher, and 6 years of litigation, this lawsuit is still ongoing, and they still have not backed down.

In H.E.B. Ministries case, Tyndale Seminary was find $173,000 for daring to issue 34 diplomas in the Bible without getting government approval first of their curriculum and their professors. Again, all the lower courts have ruled against Tyndale Seminary to this point. We are at the last stage of this litigation now and are hopeful that one of these courts will come to its senses.

Small African-American and Hispanic seminaries are being shut down across the State. One of our clients, the Institute for Teaching God's Word Seminary was shut down, and all they did was train black pastors in the Bible, and they were told that they could not do that until they first got State approval.

The most disturbing cases to me are the cases and the actions taken against children. Jonathan Morgan, a 9-year-old student in Texas just wanted to give a gift to his fellow students at the Christmas party like everybody else was doing. School officials, however, stopped him at the door of the classroom because his candy cane had a religious message attached to it. Again, here we are 7, 8 months later, the school officials and the school attorneys have refused to back down. They stand on their position, and they are forcing Jonathan and his family to actually prepare for a lawsuit in order to protect his right to hand out a candy cane to his friends at school.

A Hispanic kindergartner—I will refer to her as Little Doe—saw that other children were bringing Pokemon and other cards to her kindergarten class. They are a poor family, but she had some cards from her Catholic Church. She brought those to school and passed those out. However, the response was incredible. The teacher not only told her to stop, but went in to all the other classes with all the other fellow kindergartners who had received these, in the front of class asked them to come forward and confiscated the cards in front of the class. She was then informed that she was never to bring religious articles to school again. Even after trying to inform her that this was wrong, to this day she is scared to bring anything or say anything religious at her school.

Another one of our clients that we are preparing a lawsuit for right now, an elementary school girl, was told she could give pencils to her friends at school but not ones with Jesus on them. She

asked her mother, crying, and I quote, "Why does the school hate Jesus, Mommy?"

The point is these little kids get the message. Their religion is treated the same as a curse word at school. They are taught at an early age, keep your religion to yourself; it is dirty. And that is wrong.

Many are aware of the *Doe* v. *Santa Fe* case in which I know, Mr. Chairman, you were involved, in Texas, the football game prayer case. Few are aware of the court order below, where the judge told the students that they could not at the graduation pray in Jesus' name, and that Federal martials would be in attendance, and that any student who violated that order would be taken to the Galveston County Jail for up to 6 months incarceration. He then followed, and I quote, "Anybody who violates these orders, no kidding, is going to wish that he or she had died as a child when this Court gets through with it." This is the atmosphere we have created in the schools for our children.

Last I want to mention the Ten Commandments case in which we were involved, *Van Orden* v. *Perry*, which involves the Texas Ten Commandments. We pointed out in that case that the attempt to remove the Ten Commandments there was an open attempt at religious bigotry. There are 17 monuments around the capital lawn at the Texas capital, yet they have focused on the one with religious content. Our question is: why is it that we should censor only our religious history? Unfortunately, the establishment clause is now a weapon to be used to eradicate ideas and expression which one disagrees with by simply labeling them as religious. It is an instrument, unfortunately, as the Ten Commandments case shows, that is now used to rewrite history, particularly to erase any religious references in our history such as the Ten Commandments as almost anyone agrees is a basic foundation of our system of laws.

The hostility is real. There is a pervasive atmosphere out there that has been created to ban or stop religion in public. The separation of religion and State fundamentalists and activist courts are succeeding instilling confusion and creating an atmosphere of hostility, one where I would say that most government officials now even feel they have some sort of duty of religious cleansing in public. We are moving quickly towards the naked public square, where religion is being treated as pornography when expressed in public, and the hostility has spread quickly from across our public schools to all areas of public life including even our public displays.

If we do not begin to speak up and act now, we are going to lose the great religious heritage and history upon which this country was founded, and I think that would be a terrible mistake.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Shackelford appears as a submission for the record.]

Chairman CORNYN. Thank you, Mr. Shackelford.

We will now have a round of questions, and I will start.

First of all, I want to say, Nashala, to you and Mr. Rosenauer and Mr. Clark, and also to you, Judge Moore. I know that each of you are here because you have endured a challenge to your right to express or protect your rights under the First Amendment of the Constitution, and we certainly respect your fervent belief and your

efforts to protect your rights. One of my biggest concerns is that people who do not have the money or do not have a lawyer or who do not have the time, or who just simply do not want to put up with the ridicule that you might suffer in order to protect your rights under the First Amendment, just simply give up. Indeed, one of the problems, we will hear from the next panel, is that the law is not clear. It is contradictory in many respects, and so individuals, organizations, governments, simply default to a religion-free, faith-free zone because they are concerned about being sued or other consequences that are obviously. It is because of the courage of people like you, Nashala, Mr. Rosenauer, Mr. Clark, and Judge Moore, that these issues are brought to our attention, and I think they are worth of discussion. They should not be swept under the rug for many of the reasons that you have already mentioned.

But in listening to the testimony here today, I actually think that there is some consensus at least on what it is that we are concerned about. On the one hand, the First Amendment protects religious liberty, free exercise of religion, but also it prohibits the establishment of religion, the government officials, in Mr. Rosenauer's case, dictating what kind of specific religious prayer that might be offered.

But. Mr. Rosenauer, in your case, you believe you were able to reach a satisfactory resolution by a consent agreement that provide for a nonsectarian prayer; is that right, sir?

Mr. ROSENAUER. Yes. We have entered into a consent agreement, and the Judge entered it in the court about a week and a half ago, and in the consent agreement it constrains the school board members or anyone acting on their behalf basically from preaching, proselytizing or otherwise advancing any specific religion either during the invocation or during the school board meeting. It does not enjoin them from having an invocation. The invocation or sample invocation, I should say, that was attached to it as an example, does mention God in it. It is not against religion, our suit, against this school, was not against religion, it was against a government endorsing a religion.

Chairman CORNYN. And you were satisfied with that outcome?

Mr. ROSENAUER. We settled it, yes.

Chairman CORNYN. Sometimes the settlements, that means that neither side is entirely satisfied.

Mr. ROSENAUER. I think that is probably the best way of putting it. If the school board actually does follow through with the settlement, then we will be very satisfied.

Chairman CORNYN. Thank you very much.

Mr. Clark, what would have happened if you and the other seniors there at the community center, the senior center, had just simply caved in when they said you could not sing or pray?

Mr. CLARK. That is what Mr. Moorhead put it in his letter. He said, I believe the site council, which is the ruling majority there. We meet every month, decide the issues of the center. He said, I believe the site council can resolve this issue. The only way we could have resolved it was just knuckle under to it, to their demands, and we refused. We refused to knuckle under. Probably the center would probably have shut down because half the people would have quit going.

Chairman CORNYN. I know you cannot say for sure, and none of us can for sure, but do you suspect that there are other instances that may be occurring across the country where people do not have the courage to stand up and they do in fact knuckle under?

Mr. CLARK. I am real sure of it, and that is one of my purposes here. I hope that I can encourage somebody to have enough backbone to stand up. As Christians we have been taught to turn the other cheek. There comes a time you run out of cheeks and you have to stand up and be counted.

[Laughter.]

Chairman CORNYN. Mr. Walker, let me ask—and here again I think there may be more we share in common here in this hearing than divides us, but let me just ask you a question and ask you to comment on it. I gather the Baptist Joint Committee supported the Equal Access Act in 1984, which simply says that public secondary schools may not discriminate against religious groups in providing access to public school buildings for meetings and events during off hours. And as the Supreme Court told us in the recent Good News Club decision, to do otherwise would violate the free speech clause of the First Amendment. But what amazes me, is you look back in 1984, and that actually, that legislation was somewhat controversial at the time.

But am I correct that you and the organization you represent supports the Equal Access Act and agree that public secondary schools may not discriminate against religious groups in providing access to public school buildings for meetings and events during off hours?

Rev. WALKER. We certainly do, and we support it today. We were involved in the debate in the Congress along with then Senator Mark Hatfield and others. We thought that was a good way to do religion in the public schools that involved taking religion seriously and accommodating the needs of students to practice their religion and to meet and discuss their religious views, while at the same time keeping government from getting involved in promoting or advancing religion or governing religious exercises. So, yes, we very much supported it. We defended it in the Supreme Court in the Mergens case, and we continue to work out the details from that very important piece of legislation.

And we filed a brief in the Good News case too. It was not an Equal Access Act case, but it was an equal access principle that we thought students should be allowed to meet with outside groups after class on school campus.

Chairman CORNYN. I raise that issue, and I point out that in 1984 there was no overwhelming consensus in favor of that outcome. In fact, there were groups like the American Civil Liberties Union and People for the American Way, who were on the other side of that, that raised constitutional objections to the Equal Access Act.

Rev. WALKER. My friend, Eliot Mintzberg from People For said they were not on the other side of that one, and they have been very good at helping us enforce the parameters of the Equal Access Act.

Chairman CORNYN. My information is that they were on the losing side of that case. But just, it is funny you should be talking

about the People for the American Way, because I noticed on my Blackberry, they have already issued a press release commenting about this hearing and criticizing this Committee for conducting a hearing that would provide a forum for Judge Moore to speak out. I guess they failed to note, at least in the e-mail I saw, that there were others here, that there are six members of this panel, and we are talking about a variety of concerns about the First Amendment protections and certainly not just any single case.

Mr. Shackelford, let me just ask you what sort of difficulty do people have? I think you mentioned, was it Mr. Clark's case or maybe another, where people had to get together and raise $80,000 just to be able to afford a lawyer to defend their rights. Is the money and the time and possibly even the public ridicule that people have to endure in defending their rights under the free exercise clause, does that represent a real problem in terms of people getting to be able to express their views publicly?

Mr. SHACKELFORD. Mr. Chairman, no question. Most people immediately just cave because they feel like, I am not OJ and I cannot hire the dream team, so I am going to back down. The extra problem is that unlike other lawsuits, our religious freedoms and our constitutional rights are much more valuable, but they do not result in damages. So number one, attorneys might be less likely to take those because there is not great remuneration at the end, and number two, and even more problematic, the government entities, therefore, are much more likely to drag their feet because there is no downside to them. They do not have to pay damages. I think that some improvements statutorily in the future would maybe get a lot of these things settled more quickly if there was actually a downside to the government entity who was refusing to take care of people like Mr. Clark and the other seniors that are involved there.

Chairman CORNYN. Thank you very much

Nashala, let me ask you one question. Now, I believe in your case, when your school told you that you could not come and wear your head scarf to school, your lawyer mentioned earlier today that they said that, well, if you wanted to wear a head covering for medical reasons, or if you wanted to wear a head covering for recreational reasons, or perhaps for educational reasons, that they would allow it, but they would not allow you to wear your head scarf as a manner of religious observance. Is that right?

Miss HEARN. Yes.

Chairman CORNYN. Thank you very much for answering the question.

At this time I will be glad to recognize the Ranking Member for any questions he may have.

Senator FEINGOLD. Thank you, Mr. Chairman.

Reverend Walker, thank you for appearing before the Committee today. You have a very distinguished record regarding church/state issues. Today we heard Mr. Shackelford discuss cases in which children are allegedly being deprived of the right to religious expression in school. Can you say a bit about the scope of legal rights of children with regard to religious expression in schools today?

Rev. WALKER. Generally speaking, the religious rights of students should be protected and is being protected in most cases. It

is the government we do not want getting involved in religion, but the government should accommodate the religious needs of students. So passing out a pencil with Jesus' name on it, or a candy cane, or other vestiges of religion, inviting somebody to come to church, or even witnessing to another classmate, I think is not only not constitutionally prohibited, it is constitutionally protected, and I think we are doing a lot better. Notwithstanding the cases that have been brought before this Committee, I think we are doing a lot better in that area than we used to.

We have got problems on both sides of that course of neutrality that I think the schools ought to take, and we can bring attorneys from People For to this board and tell horror stories on the other side too. So there are problems on both sides, but I think in the main we are doing better now.

There is some limitation I think to what even students can do and say on campus. They cannot be disruptive. It has to not be harassing of other students. You can ask somebody to go to church with you, but if they say no, you cannot badger them on and on, and I think the school have an obligation to maintain some peace and harmony there when proper religious expression gets out of hand and turns into harassment, particularly in the younger grades.

Senator FEINGOLD. I would agree with that. I note that when the Clinton administration issued their explanation of what was really allowed and what it not allowed, people who were concerned became less concerned when they realized the scope of activities that certainly are protected within the school.

Mr. Shackelford, as you know, S. 2323, introduced by Senator Shelby, would remove jurisdiction from both the Supreme Court and the inferior Federal Courts regarding matters where relief is sought against an entity, officer or agent of the Federal, State or local Government by reason of the entity or agency's acknowledgement of God as the sovereign source of law, liberty or government. Senate Bill 1558, introduced by Senator Allard would remove jurisdiction from inferior Federal Courts regarding the subject matters of displaying the Ten Commandments, the word God in the Pledge of Allegiance, and the motto "In God we trust."

In the Balch Springs case the Court played an important role for you and your client. By filing suit in U.S. District Court you were able to bring the parties to the table and ultimately to reach an agreed judgment on January 8th of this year. Do you not agree that Federal Courts can play a valuable role in resolving disputes about religious expression, and that in effect stripping the courts of their jurisdiction regarding these very important issues might be detrimental to the free exercise of religion?

Mr. SHACKELFORD. I do think they can obviously play a valuable role. The problem is if they go so astray of the words of the Constitution that they are not actually helpful, but they act like a legislature, and I think that is the concern. The idea that our Founders, in passing the First Amendment, would think that there is something wrong with acknowledging the existence of God, I think is an example of how far they have gone adrift, but I do think that the courts can be helpful. I think the shame in the religious freedom area is that the only way those of us who practice in this area

can win now is under the free speech clause, that the free exercise clause has been so reduced that you have to argue free speech to protect religious expression, and I think that is sad.

But again, you cannot argue free speech and therefore you can get some protection in the courts for religious freedom even today.

Senator FEINGOLD. I appreciate your candor in that answer because a couple of the episodes today on both sides of this question were assisted to the right answer by the ability of the Federal Courts to be involved.

Mr. Rosenauer, thank you for agreeing to appear before the Committee and sharing your family's story with us. Some people who have followed your case seem to think that the school board members were simply engaged in their own private religious expression. To you and others, opening school board meetings with the Lord's Prayer amounted to government endorsement of religion and made those who did not share the religious views of the board members feel something like outcasts. I take it that you support the free exercise of religion as long as it is not government endorsed; is that right?

Mr. ROSENAUER. Oh, definitely. If I can just go back a minute to Mr. Cornyn's question a little bit. You asked if we were satisfied. One of the things on the agreement is that we had actually wanted in the agreement places where discussion of specific deities was allowable, specific as far as content and such like that. And actually, the school board members are the ones who did not want that include in the agreement.

But, no, to your question, yes. It is just that this—our action against the school board, an awful lot of the people in Manatee County and the officials were trying to turn it into a religious argument, religion versus non-religion and so on, and basically it was not that. It was a matter of the Rosenauer family standing up to the government in the name of the school board for I have a right to raise my children in the faith and in the manner to which I believe, and not in the faith and the manner to which they believe in.

Senator FEINGOLD. Thank you, sir.

Back to Reverend Walker. In testimony today, Judge Moore states that he believes public officials are unfairly restricted in acknowledging God. What in your view is the scope of public officials' rights to acknowledge God in their official capacity?

Rev. WALKER. I think they can certainly talk about their religious convictions in their campaign speeches, in their speeches on the floor. They can use their religious beliefs to inform their policy decisions in a variety of ways, but they cannot use that religious acknowledgement or conviction to force that believe on other people through coercive action. They cannot, as in the case with Judge Moore, set up a religious shrine at the front of the highest court in the State of Alabama, by which everyone who goes into that courtroom must pass in order to get justice. I think that is more than an acknowledgement of his belief in God, but actually establishing a religious tradition, a preferred scripture, and creating a religious display that under any imaginable understanding of the establishment clause violated the intent of that provision.

And then of course there are legal guidelines that we use to determine whether the policies that result from those religious convictions are constitutional, they have to have some secular purpose. They may not have the primary effect that advances religion, may not excessively enable the government with religion. As long as it passes those tests, the fact that a public official acknowledges God or has some religious motivation behind his or her actions in office, is not problematic in my view.

Senator FEINGOLD. Thank you, Reverend.

Thank you, Mr. Chairman.

Chairman CORNYN. Thank you, Senator Feingold.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. These certainly are important issues, delicate and sensitive issues for America. We need to respect other people's faith and be sensitive to that. I think that is the first rule of courtesy, is to be sensitive to other people and how they believe.

I remember vividly saying something to my father once about some strange religious practice I thought was strange at least. And he said never make fun of somebody's religion. And I think that is American tradition, that we respect faith, and I do believe that the Founders respected faith, and they intended people to be able to exercise it freely, but they did not intend for the government to favor one religion over another. I think that is fundamental to the deal. I read recently a biography of James Madison and his marvelous letter about the persecution of the Baptists in Virginia. The Anglican Church, many of them were corrupt, were being paid by the State, and they put in jail Baptists, and he could hear them singing hymns. And so he felt real strongly about it, and so did Jefferson. But Washington and Patrick Henry are on the other side. It took a long battle before they passed this thing.

But let me just ask you this, Judge Moore. Virginia Act for Establishing Religious Freedom was Jefferson's and Madison's victory in Virginia for religious freedom, something I am most proud of. You do not know I am going to ask this, but you probably know about it because I know you are a scholar of these things. But again it is this way.

This is a Virginia Act Establishing Religious Freedom, well aware that almighty God hath created the mind free, that all attempts to influence it by temporal punishments or burdens or by civil incapacitations tend only to beget habits of hypocrisy and meanness and are a departure from the plan of the holy author of our religion, who being a lord, both of body and mind, yet chose not to propagate it by coercions on either, as was in his almighty power to do.

I remember very vividly the first conversation you had with me at one point, and I do not even know how it came about, and you shared to me your view that there is a difference between acknowledging God and establishment of a religion.

Justice MOORE. Exactly.

Senator SESSIONS. We do not have a whole lot of time, but could you share with us your view of that?

Justice MOORE. Well, first, turning back to the Bill for Religious Freedom, clearly that was Jefferson's statement, well aware that

almighty God hath created the mind free and manifested his supreme will that free it shall remain by making it all together insusceptible of restraint, that all attempts to influence it by temporal punishments, burdens or civil incapacitations tend only to beget habits of hypocrisy and meanness and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as it was in his almighty power to do; but to extend it by its influence on reason alone.

Now, listen to this, that the impious presumption of legislators and rulers, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, have created and maintained false religions across the earth to all mankind.

What Jefferson is saying here is that God gives us the freedom, and for a Baptist representative here to say a public official cannot acknowledge God is hypocrisy. We have a right, we have a duty to acknowledge God. The organic law of our country, the Declaration of Independence, according the United States Code Annotated, states that this Nation was established by the laws of nature and of nature's God, that we hold these truths to be self evident that all men are created equal and endowed by their Creator with certain inalienable rights. Among these are life, liberty and pursuit of happiness. And Government's only role is to secure those rights for us.

Now we find the Federal Courts coming into our State and telling us we cannot acknowledge God. That is exactly what they did in Alabama. They have no right, no jurisdiction to do that. The only purpose of the First Amendment was to keep the Federal Government out of the affairs of the State with regard to the acknowledgement of God.

Why is there so much confusion in the First amendment? It is very simple. The law says Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. We have just forgotten the word religion, what it means. We have confused it with terms that you cannot accommodate, you cannot promote, you cannot advance, you cannot endorse, you cannot excessively entangle. We feel like outcasts. We are offended. All these are feel good things, not law. We have departed from the law. If Congress cannot make a law, how in the world can the Supreme Court interpret a law that Congress cannot make?

You see, the Supreme Court is coming into the States and telling these States that any acknowledgement of God is verboten. Well, that contradicts the laws of every State. It contradicts my oath in Alabama. They said, well, the justice system. The justice system in Alabama is established invoking the favor and guidance of almighty God.

I want to answer your question with one other thing. The House of Representatives in 1854, 100 years before they put "under God" in the pledge, they talked about religion. This is the Judiciary Committee. They said: Congress shall make no law respecting the establishment of religion. Does our practice of chaplaincy in the military present practice violate this rule? What is an establish-

ment of religion? It must have a creed defining what a man must believe. It must have rights and ordinances which believers must observe. It must have ministers of defined qualification to teach the doctrines and administer the rights. It must have test for the submissive and penalties for the nonconformists. There never was an established religion without all these.

You see, God's not religion. He never has been, and man is not the neutral party here. Government is not the neutral party. It is God who gave us that freedom. These matters belong to the States, not to Federal Government. The Constitution Restoration Act of 2004 says something so basic that no American person should disagree. It says that when a Federal or State official acknowledges God—by the way, they all do, even the United States Supreme Court opens with God save the United States and this Honorable Court. Every representative here in Congress opens their sessions with prayer. "In God we trust" is the national motto. The President takes his oath, not on the Koran, but on the Holy Bible. That is not to deny other people the right to worship according to the dictates—

Senator SESSIONS. Could he take it on the Koran?

Justice MOORE. If that was his choice, yes. It would not acknowledge the God upon which this Nation was founded, but has he got the freedom to do that? Absolutely, it is not an establishment of religion and the President would not be Congress. Congress shall make no law respecting the establishment of religion. Is a monument a law? Does a monument forbid you to do anything or command you to do anything? Is it establishment? Is it religion? Am I Congress? And you say, well, by and through the Fourteenth Amendment. By and through the Fourteenth Amendment does not give the right of the Federal Government to forbid the acknowledgement of God from the States. It is that simple. It is outside Federal jurisdiction and this Act should be passed by Congress to stop—we call this court stripping. In the 107th Congress, just last year, they used this Article III jurisdiction 12 times, one of them by Representative Daschle regarding the forestry out in his district. Certainly if you can use it for that, you can use it to stop the Federal Courts from interfering with the right of the States to acknowledge God. It is not taking anything from the Courts to which they have a right to. It is restricting, regulating them in accordance with Article III from something they have no jurisdiction of.

Senator SESSIONS. Mr. Walker, briefly, I think you would want to respond.

Rev. WALKER. Yes.

Senator SESSIONS. And maybe Mr. Shackelford, you lawyers. But I wonder seriously if Judge Moore is not touching on something that maybe could help us out of this thicket. He is saying it is alright to acknowledge God, but you cannot propagate a faith or a religion. Would you comment on that, and Mr. Shackelford?

Rev. WALKER. Sure. Yes, I did not say that it was impermissible for a public official to acknowledge God. I said just the opposite, and Judge Moore just catalogued the dozens of ways in which that is commonly done. Senator Shelby withdrew the laundry list earlier. Religion is routinely acknowledged by public leaders.

But what you cannot do is to put up a monument in the middle of the courthouse that starts off saying "I am the Lord your God, who brought you up out of the land of Egypt, the house of bondage. You shall have no other Gods before me," and to put the imprimatur of the highest judicial officer in the State of Alabama on that expression of religion, if that is not establishing a religion, I do not know what does. That is the difference. It is not just an acknowledgement. It is an establishment, not just of religion generally, but of a particular religious tradition, and we part company simply on that conviction.

Two Baptists here disagreeing with one another like you have never seen before.

Justice MOORE. We may disagree, Senator, but he also disagrees with George Washington, John Adams, the first Senate, the first Representatives of the House of Representatives, who after April 30th, 1789 in New York City, right above Wall Street, he took his oath, acknowledged God. They went up the street and went to St. Paul's chapel. I recently visited St. Paul's Chapel. Anybody here can go. It stands right at the edge of Ground Zero, and right in front of the chapel with the Ten Commandments in two tables of the law. They went back to Federal Hall and formed the first First Amendment, and the first thing they did was allow the President to acknowledge God. The only thing the case in Alabama stands for, according to the Federal District Judge—and I have his opinion right here—he said he was not saying that the Ten Commandments could be displayed in government office buildings. He was saying that when you did it with a monument, with the express purpose of acknowledging the Judeo-Christian God as the moral foundation of law, you cross a line between the permissible and the impermissible. No judge, no Federal Court, can tell a State official to violate his oath of conscience to his own Constitution that acknowledges God. That is simply an acknowledgement of God. It always has been and always will be.

Mr. SHACKELFORD. Senator, to answer your question, there are sort of two concepts rolling around here, and I think Judge Moore hits it, is we are talking about the establishment clause. Unlike the Supreme Court, unfortunately, we ought to look at the words of the establishment clause. It says "an establishment of religion." We hear terms like separation of church and State thrown around, but almost never will you see a situation where the term even applies because it is almost never a church. It is usually some kid in a school or some situation. It is the attempt to separate religion from State, which is never what the Founders intended. It is not what the establishment clause is meant to do. That is hostility to religion, to separate religion from State. It is talking about really the separation of not having an establishment of religion, and the danger of this separation of church and State terminology is we live in a society now where government is almost everywhere we go. If you have strict separation that is simply a nice vehicle to say religion needs to retreat to the corners of society, because everywhere the government is, religion has to retreat.

Senator SESSIONS. Such as a senior center, senior citizens center.

Mr. SHACKELFORD. Yes, and that is why the confusion with the senior citizen center. That is why this type of thing is going on. If

we went back to the words of the Constitution, even besides the fact that it says Congress, okay, and almost never is it a Congress that we are talking about, let us just look at the words "an establishment." That is not talking about the current test of the Supreme Court, for instance, the endorsement test, that is supposedly unconstitutional for the government to endorse religion in general. I mean our Founders would be shocked at the idea that you cannot say religion is good. But that is what the test says because they have so gone away from what the Constitution says, and they are making up the rules as they go.

Senator SESSIONS. Chairman, I guess my time is over.

[Laughter.]

Senator SESSIONS. Thanks to all of you.

Chairman CORNYN. I am enjoying the vigorous debate, discussion and testimony of these witnesses. We thank all of you for being here. We have another panel right behind you, so we are going to thank you and ask you to make way for the next panel.

I know a question came up earlier about the People for the American Way's position on the Equal Access Act, and against the Good News Club decision, and we will make a copy of those amicus briefs raising objections in both of those cases part of the record without objection.

[Pause.]

Chairman CORNYN. We are going to move quickly in the interest of time to the next panel, so if I can ask everyone else in the chamber please to hold it down a little bit, we will do that henceforth.

We have three distinguished legal scholars. Professor Richard Garnett, who is an Associate Professor of Law at Notre dame Law School in South Bend, Indiana. Professor Garnett received his undergraduate degree from Duke University and his law degree from Yale Law School. He served as a law clerk in the Federal Public Defender's Office in Arizona as well as a law clerk to Chief Justice William Rehnquist, and Chief Judge Richard S. Arnold of the U.S. Court of Appeals for the Eighth Circuit.

Professor Melissa Rogers is a Visiting Professor of Religion and Public Policy at Wake Forest University Divinity School in Winston-Salem, North Carolina. She previously served as the Founding Executive Director of the Pew Forum on Religion and Public Life, and as General Counsel of the Baptist Joint Committee on Public Affairs, the same organization that Mr. Walker is associated with. She received her law degree from the University of Pennsylvania Law School and her undergraduate degree from Baylor University, which of course is located in the great State of Texas.

Professor Vincent Philip Muñoz is a Civitas Professor with the American Enterprise Institute here in Washington, D.C. He is an Assistant Professor of Political Science at North Carolina State University, where he teaches public law and political philosophy. Professor Muñoz received his Ph.D. from Claremont Graduate School, his M.A. from Boston College and his B.A. from Claremont-McKenna College.

Thanks to all of you for being here. We very much appreciate the benefit of your expertise and enlightenment on this difficult subject, and we look forward to hearing from you.

Professor Garnett, you may please proceed.

**STATEMENT OF RICHARD W. GARNETT, ASSOCIATE PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL, SOUTH BEND, INDIANA**

Mr. GARNETT. Mr. Chairman, I thank you and your colleagues for the chance to share my thoughts with you about the place of religion in civil society, and also about the protections that our Constitution guarantees to religious expression. These are issues of great importance to all of us, and to me as a lawyer, a teacher and as a citizen.

I have a longer law professorish statement that I would like to have included in the record if that is all right.

Chairman CORNYN. Certainly. It will be made part of the record without objection.

Mr. GARNETT. I will begin with a fundamental premise. As President Clinton put it nearly 10 years ago, religious freedom is literally our first freedom, and it was central to our Founders' vision for America. True, the framers did not always agree about what the freedom of religion meant, and we were reminded of that today. But they knew that it mattered, and they were right.

The protections afforded to religious freedom in our constitutional text and tradition are neither accidents nor anomalies. They are not, as one scholar has claimed, an aberration in our secular state. Our Constitution does not regard religious faith with grudging suspicion or as a bizarre quirk or quaint relic, rather as a former colleague of mine once observed, our laws protect the freedom of religion because religion is important, and because, put simply, the law thinks religion is a good thing.

In our tradition religious freedom is cherished a s basic human right and as a nonnegotiable aspect of human dignity. Accordingly, we should regard government restrictions on religious expression and not religious expression itself with sober skepticism.

As you know, Mr. Chairman, the law books and the papers are full of stories of public officials who have lost sight of these fundamental premises, and these officials have on occasion turned things upside down, treating citizens' public religious expression with suspicion rather than with evenhandedness and respect.

The good news though is that the Supreme Court by and large continues to reaffirm that the Constitution neither requires nor permits State actors to single out private religious expression for unfavorable treatment. The Court continues to remind us, in other words, as Justice Scalia has put it, that private religious speech, far from being a First Amendment orphan, is as fully protected as secular private expression.

Why does discrimination against religious expression continue again from time to time? I am confident that the public officials involved in the cases you have heard about today do not for the most part harbor ugly prejudice or deep hostility toward religious believers. Instead, I am convinced that many well-meaning Americans today fail to understand in several important ways the text, history and purpose of our First Amendment.

For starters, many misunderstand the meaning of the phrase "separation of church and State" and the place of this idea in our tradition. To be sure, the separation of church and State, if properly understood, is a crucial component of religious freedom, that

is, the institutional and jurisdictional separation of religious and political authority, respect for the freedom of conscience, and strict government neutrality with respect to different religious traditions, all of these separationist features of our Constitution, have helped religious faith to thrive in America. In other words, the separation of church and State, if properly understood, is not an anti-religious ideology, but an effective way to implement our overarching commitment to religious freedom.

Unfortunately, many have confused Jefferson's figure of speech about a wall of separation with an entirely unsound rule that would authorize public officials to scrub clean the public square of all sectarian residue. This view is seriously mistaken, and indeed, as John Courtney Murray lamented, about 50 years ago, arguments like this stand the First Amendment on its head, and in that position, he said, it cannot but gurgle nonsense. In fact, our Constitution separates church and State not to confine religious belief or to silence religious expression, but to curb the ambitions and reach of governments. The aim is not to put religion in its place after all, government lacks the authority to determine religion's place, but to protect religion by keeping the government in its place.

In addition, many of us have forgotten that the First Amendment constrains government conduct only. It has nothing to say about private action except of course to confirm that religious expression and exercise and worship are worth protecting. The establishment clause is not a sword, driving private religious expression from the marketplace of ideas. Rather the clause is a shield that constrains government precisely to protect private religiously motivated speech and action.

So nothing in our tradition implies a duty of self censorship by religious believers, and nothing in the First Amendment suggests that religious expression is out of place or unwelcome in public debate. Still, many appear to have the view that it is somehow in bad taste to bring religion into discussion of public policy. On this view, as Stephen Carter memorably put it, religion is like building model airplanes, just another hobby, something quiet, something trivial, not really a fit activity for intelligent adults.

But in fact our Constitution does not demand the trivialization of religion. and does not require what Richard Newhaus famously called a naked public square. There is no "don't ask-don't tell" rule that applies to religious believers who are presumptuous enough to venture into public life, and there is no special obligation on devout religious believers to sterilize their speech before entering the public forum. Active and engaged participation by the faithful is perfectly consistent with the institutional separation of church and State that the Constitution is understood to require.

Thank you very much.

[The prepared statement of Mr. Garnett appears as a submission for the record.]

Chairman CORNYN. Thank you, Professor Garnett.

Professor Rogers, we would be happy to hear from you.

**STATEMENT OF MELISSA ROGERS, VISITING PROFESSOR OF RELIGION AND PUBLIC POLICY, WAKE FOREST UNIVERSITY DIVINITY SCHOOL, WINSTON-SALEM, NORTH CAROLINA**

Ms. ROGERS. Thank you Mr. Chairman, Senator Feingold and other members of the Subcommittee. I am Melissa Rogers, and I am Visiting Professor at Wake Forest University Divinity School. As you said, I also formerly served as the Founding Executive Director of the Pew Forum on Religion and Public Life and as General Counsel to the Baptist Joint Committee on Public Affairs.

I am also an attorney, a lifelong Baptist and a youth Sunday school teacher, probably one of the hardest of my jobs.

Mr. Chairman, I am not persuaded that there is persistent or frequent governmental hostility toward religious expression in the public square. I see no need for legislation on this issue. Indeed, I believe that religious freedom is something that America usually gets remarkably right.

Let me take a few minutes just to look at some of the examples that we have seen this afternoon. We have talked a lot about the Supreme Court, and I am sure we will do so more. In my opinion the Supreme Court has struck a very wise balance by prohibiting the government from promoting religion, but also by protecting the people's rights to promote their own religion. That is a very wise balance. It spells benevolent neutrality toward religion, not hostility toward religion. It promotes religious freedom, and it also, I would add, protects religion by keeping the government out of religion. That is good for religion. It helps religion to stay vital and autonomous from the State.

The first case that we talked about this morning was the Hearn case, and in my opinion, that case represents a very serious mistake that was made by the school, and I am grateful that the Department of Justice entered that case to set things right. The facts that I know do not suggest in that particular example a kind of generalized hostility to religion, but they may perhaps suggest some kind of particularized hostility to Islam, and certainly in the wake of the 9/11 attacks it is particularly important that our own country protect the practice of Islam and our own country. President Bush I think did a very good job of that right after the 9/11 attacks and we need to continue to educate people about the practice of Islam in America, and to protect students' expression of their faith by wearing a head covering and by having this opportunity to pray during the school day.

Several examples that Kelly Shackelford mentioned about students in schools and their giving gifts to other students and cards and things, when there were times for gift giving and the like, and from what I know about this, these sound like examples of personal expression of religion that the law protects. In other words, this is not a problem with the law, this is a problem with a misunderstanding of the law. In my general experience, like Professor Garnett, this does not stem from hostility towards religion, but ignorance about the law and confusion.

When any violation is identified like Nashala Hearn's, it is a serious matter. It is something that we should seek to rectify quickly. But we need to treat problems with the right remedy. When we have a misunderstanding of the law we need to educate people bet-

ter about what the law is. We do not need to change the law in that situation.

Also the senior center also sounds to me like that is personal expression that the law protects. Indeed, I worked with people during my time at the Baptist Joint Committee to write some rules for senior citizens that allowed this kind of equal access rule to be instituted, where groups were allowed to have private meetings, whether they were religious or not, in the senior center, and they were allowed to do that without interference from the State because that was recognized as individual religious expression, not government religious expression. And there is an important difference between the two.

Judge Moore's case does not stand for the proposition that all Ten Commandments displays are unconstitutional. Beside being able to post Ten Commandments in our churchyards and our homes and the yards out in the front, there are also ways to display the Ten Commandments in a constitutional manner on government property. And this case does not prohibit public officials from acknowledging God. In my testimony I talk about many ways in which government officials can reflect their personal religious convictions and that is all quite appropriate. This case does not reflect hostility to religion. Instead this case stands for the proposition that the American Government will not endorse the majority Christian faith over other faiths. That is a noble proposition. It stands for the principle that the government will not become involved in the propagation of religion, but it will leave that task to citizens and to houses of worship. That is a wonderful proposition. It leaves us as religious people more free. The case stands for the notion that the American courts belong to all of us and not just those who believe a certain way.

As I have heard more about Judge Moore's case, I think about how I would feel as an attorney if I lived in another land, in another place, where the State endorsed Islam, for example. How would I feel if on my way to court I had to pass a central monument lifting up the religion of Islam? How would I feel if I was made to stand to listen to Islamic prayers in the courtroom before I started my case, and to give attention to those prayers? I think I would feel unwelcome as a Christian. I think I would feel that the State was coercing me to give respect and honor a religion I do not endorse or believe in. I think I would have legitimate concerns that that Nation's courts would not treat me and my fellow Christians as well as it would treat Muslims.

We cannot get off the hook by simply saying that will never happen in America. That is not a good justification. There has to be a principle here, and if the situation I described is intolerable and wrong in our own country and it is intolerable and wrong for a State-endorsed Islamic faith, then it is just as intolerable and wrong for us to do it as Christians in our own country. Instead we have to extend to others the same freedom we demand for ourselves.

Where there are misunderstandings of the law, either over interpretations or under interpretations, they need to be corrected. Those are serious mistakes, and any denial of religious freedom, I would work very hard to correct, and I have been a part of those

educational solutions in the past and I would like to work toward more educational solutions in the future. But the First Amendment gets it right. It prohibits the government from promoting religion, but protects the people's right to do so.

This is not the French rule. There was talk earlier about some effort perhaps in America to cleanse the public square of religion. France, I think, is arguably headed in that direction because they are saying, "You cannot have this religious symbol on government property. That is inappropriate. You are on government property. You take off that religious symbol." That is cleansing the public square of religion.

We do not have that rule. The key question in our own country is to whom the speech is attributable. If it is attributable to a person, then it is protected. If the promotion of religion is attributable to the State, then it is prohibited. That is the right rule.

Finally, let me just close by saying there is one thing that I want to mention that has troubled me in this hearing, among some other things. I have heard a number of people talk about on the one side we have religious liberty, and that is one thing, and on the other side we have this establishment clause. So we have religious liberty over here and we have the establishment clause over here. So the establishment clause is not a part of supporting religious liberty. It is almost as if we are saying the free speech and free exercise clause are religion's friend and the establishment clause is religion's foe. They are two different things and they do not work together.

I think by preventing the government from supporting religion we keep the government out of religion. We acknowledge that religion is not and should not be a creature of the State. We acknowledge that the government should not be making decisions about religion. Indeed, I feel sort of sick when I start hearing people talk about nonsectarian, nonproselytizing prayers. That means the government is going to determine what is sectarian and what is proselytizing. It means that the government is going to be very much involved in making determinations about religious doctrine and speech, and it seems to me we have to avoid that bad result. We also have to avoid the government endorsing religion, and we have to leave that promotion of religious expression to people and to their houses of worship.

By keeping the government from supporting religion, we actually ensure that religion remains vital, strong and autonomous in America.

In short and in closing let me say that under the free exercise clause, government should not interfere with religion. Under the establishment clause the government should not support religion. When we put these two things together, we get real religious freedom, and that is the noble goal we should continue to pursue.

Thank you.

[The prepared statement of Ms. Rogers appears as a submission for the record.]

Chairman CORNYN. Thank you, Professor Rogers.

Professor Muñoz.

**STATEMENT OF VINCENT PHILIP MUÑOZ, CIVITAS FELLOW OF RELIGION AND PUBLIC LIFE, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C., AND ASSISTANT PROFESSOR OF POLITICAL SCIENCE, NORTH CAROLINA STATE UNIVERSITY**

Mr. MUÑOZ. Mr. Chairman and members of the Subcommittee, thank you for inviting me to present my views. I am the Civitas Fellow of Religion and Public Life at the American Enterprise Institute and an Assistant Professor of Political Science at North Carolina State University.

In addition to my spoken comments, I have a longer written statement that I would like to submit for the record.

Chairman CORNYN. Without objection.

Mr. MUÑOZ. I want to try to explain today why the hostility toward religion that we have heard is taking place, and if I can communicate only one point in my testimony today, it is this: the Supreme Court of the United States remains primarily responsible for the continued legal hostility towards religion in America today. Simply stated, the Supreme Court has interpreted the establishment clause in a manner that encourages and sometimes demands hostility toward religion.

Two establishment clause doctrines in particular lead to hostility toward religion, the endorsement test and the coercion test.

The endorsement test, which was invented by Justice Sandra Day O'Connor in the 1984 case, *Lynch* v. *Donnelly*, prohibits State actors from endorsing religion. It purportedly keeps government religiously neutral. In practice, however, no endorsement quickly becomes outright hostility, especially in the context of public school. Under this rule activities that a child perceives to favor religion must be prohibited to avoid the appearance of governmental endorsement. The quintessential example of how the endorsement test purges religion from the public square and public schools occurred in the 1985 case, *Wallace* v. *Jaffree*. The Supreme Court used the test to strike down an Alabama law that directed the public school day to begin with a moment of silence for voluntary prayer. Justice O'Connor claimed that to set aside only one minute for children to pray silently to themselves endorses religion, and thus, under her interpretation, violated the Constitution. In 1989 the Supreme Court used the endorsement test to require the removal of a privately-funded nativity scene in front of the courthouse of Allegheny County, Pennsylvania, and perhaps most notoriously, the Ninth Circuit Court of Appeals employed the endorsement test to prohibit teacher-led recitations of the Pledge of Allegiance in public schools. The words "under God" the Ninth Circuit claimed, endorse a particular religious concept, namely, monotheism. The Ninth Circuit's decision has come under heavy criticism including criticism from the Senate, but the Ninth Circuit only followed the example set by the Supreme Court. "Under God" endorses the civic faith Americans have adopted since the signing of the Declaration of Independence, but this expression and the tradition it follows, if we use Justice O'Connor's standards, violate the Constitution.

The second leading test used by the Supreme Court for establishment clause jurisprudence is the coercion test. Invented by Justice Kennedy in the 1992 case, *Lee* v. *Weisman*, the coercion test sounds reasonable. No one believes the that State legitimately may coerce

religious practice, but as applied by the Court, it too drives religion out of the public square. In *Lee* v. *Weisman* the Court eliminated a nondenominational invocation and benediction at public school graduations. According to Justice Kennedy, to ask public school children to stand respectfully while others prayed psychologically coerces religious practice. In the 2000 case *Santa Fe Independent School District* v. *Doe*, as you know, the Court prohibited the Texas tradition of nondenominational prayers at high school football games. The Court said that some fans might feel like outsiders. Thus interpreted, the coercion test secures the right not to feel uncomfortable because of others publicly expressing their religious beliefs.

It is common sense to say that government may not force a student to pledge allegiance or to recite a prayer. It is all together different to say that because some feel like outsiders, others may not pray. Tolerance should be a two-way street. Like the endorsement test, the logic of the coercion test calls for the curtailment of public expressions of religious sentiment. It is not coincidence that the Ninth Circuit also cited Justice Kennedy's doctrine of psychological coercion when it struck down the Pledge of Allegiance.

The cases I have mentioned are significant in and of themselves. Their impact extends far beyond the specific parties involved. What constitutes an impermissible endorsement or psychological coercion is inherently indistinct. The law's vagueness makes State acknowledgement of religious sentiment suspect. It enables special interest litigators who are professionally hostile towards religion to file lawsuits to challenge almost any State action that accommodates religion. The pernicious effect of such litigation, and the mere threat of it, is considerable.

Imagine yourself as a high school principal or a city council member. It is easier to remove the Ten Commandments from the public park or to silence a school valedictorian who wishes to speak about religious faith than it is to fight a legal battle against the ACLU. It is easier to mandate a religion-free zone than to be sued. Fearful local officials and public school administrators have the incentive to eliminate the public acknowledgement of religious sentiment in order to avoid costly litigation, and in this way, the Supreme Court has armed anti-religious activists to impose their vision of the secular State to legal threats and litigious intimidation. The result is not only the naked public square but the trampling of religious individuals' constitutional rights to religious free exercise and the freedom of expression.

The Constitution's text prohibits laws respecting an establishment of religion or prohibiting the free exercise thereof. It says nothing about governmental endorsement of religion. Justice O'Connor has effectively replaced the text and original meaning of the First Amendment with her own words and her own ideas. Justice Kennedy's psychological coercion test is also far off the mark.

The Founders understood religious coercion to mean being fined or being imprisoned or being deprived of a civil right on account of one's religion. Coercion to them did not include merely feeling uncomfortable when other people mention God. The modern Court has lost sight of the fact that the framers of the First Amendment meant to protect religious freedom, not to banish religion from the

public square. The free exercise of religion is the primary end fostered by the First Amendment. No establishment is a means towards achieving that end. By prohibiting religious establishments the Founders sought to end things like State officials appointing bishops, limiting public office to members of the established church only, and the licensing and regulation of dissenting religious ministers. They did not mean to forbid the public acknowledgement of God or even nonsectarian endorsement of religion. They certainly did not intend to constitutionalize doctrines like the endorsement test and the psychological coercion test.

Until these doctrines are overturned, legal hostility to religion in the public square will continue.

Thank you.

[The prepared statement of Mr. Muñoz appears as a submission for the record.]

Chairman CORNYN. Thank you, Professor Muñoz, and thanks to the entire panel for illuminating the difficult issue, and one that I have struggled with in the past and continue to struggle with today. It is no wonder that local elected officials, whether they be school board officials or city council men or women or others, that they would struggle with them because indeed we see that the Supreme Court of the United States is in a struggle with itself over some of these cases.

I guess, Professor Rogers, and I appreciate very much you being here, it is tempting to me to accept your statement that this is really a case of just people being misinformed or ignorant about what the First Amendment requires, and this is a friendly question, by the way. It really is very tempting, but I cannot agree with you if you mean by that that there are not people who are decidedly on the other side of these issues in a very organized way.

For example, I know in the Baptist Joint Committee we heard agreed with the Equal Access Act, and the Good News Club cases, we know that the ACLU and the Americans United for Separation of Church and State and People for the American Way were on the other side of it, and indeed these were, I believe, divided Court opinions. So there was not this consensus that the law is clear and the people who are misinterpreting it, it is their fault. It is not the fault of the people at the top who are indeed writing the opinions and telling us what the law is. And it really does not acknowledge the role of some of the organized groups who are out there, who from my perception, take a very hostile view toward any public expression of religion.

But I would like for you to—and I think Professor Muñoz has done us a service by focusing on a couple of tests, the endorsement test and the psychological coercion test. Could you give us the benefit of your thoughts on how if private expression of one's faith, if done in a public forum, how that would ever pass Justice Kennedy's psychological coercion test, or if done in a public forum controlled by some governmental entity, how that would ever pass the endorsement test. It seems to me like both of those would be very real impediments toward the exercise of one's religious liberty, even if from a standpoint of a private expression of faith or prayer if done in a public setting, and if indeed our goal is not to create

a faith-free zone or a naked public square, how do we get around that?

Ms. ROGERS. You refer to the coercion and endorsement test, and I would say Justice O'Connor has been the one to be principally responsible for the origination of the endorsement test. She is also the one who wrote an opinion in the Mergens case, which upheld the constitutionality of the Equal Access Act, and she gave a very sort of favorable review of that law, if you will, saying this is exactly right. She is the one wrote the statement that speech promoting and endorsing religion by individuals is protected by the Constitution, both the free exercise and the free speech clause. What is prohibited by the establishment clause is the government's promotion of religion. So I think right there you see someone, that is one example. Justice O'Connor has said things like the Equal Access Act, and also she joined in the majority of course in the Good News Club, where community groups can use school property after school on an equal access basis. She is one who has brought these things together, if you will, has said that the government should not promote religion, but it should protect the right of individuals and religious groups to do so. I think in that very example you see how that understanding can be consistent. It is certainly consistent in her own actions and statements on the Court.

Chairman CORNYN. I would say in response, and you raise an interesting point, but it sounds to me like a lot of ad hoc decision making by the judges. In other words, they look at a given case on its facts, and they say, okay, this passes the endorsement test. This does not. And there is no way for individual citizens to predict how their case might be regarded, which indeed creates an environment where there is a perceived hostility to the religious expression, because as you say, well-meaning people not understanding what set of facts are going to result in me losing the case, what set of facts are going to result in me winning the case. They simply say, we are not going to take a chance, so we are going to ban all religious expression from our senior community center, from the middle school, from the PTA meeting.

I think, Professor Muñoz, you commented in your remarks about the difficulties of apparent ad hoc decision making. Could you comment on that?

Mr. MUÑOZ. Let me get at exactly the problem you have brought up. A high school valedictorian speaking at graduation, is that a private individual speaking or is that a government actor speaking? Who is to know? That is a hard question. So what happens is the high school principal says, "Look, you cannot talk about God. I do not want to get sued. The school district cannot afford to fight against the ACLU." And that inherent ambiguity of the endorsement test leads directly to this sort of hostility in the law.

Chairman CORNYN. Thank you.

Ms. ROGERS. I do not know if I could come back to—

Chairman CORNYN. Let me tell you why the one reason why I am mystified by the Supreme Court's jurisprudence. For example, in a case that I helped argue before the United States Supreme Court when I was Attorney General, *Doe* v. *Santa Fe Independent School District*, this was student led, student initiated prayer, albeit in a public forum before a school football game. But the very fact that

it was in that forum in large part contributed the Court to striking it down as a violation of the First Amendment. It appeared to be a very fact-specific case, but the problem is when the Supreme Court of the United States finds facts, there is no predictability in the outcome.

Professor Garnett, would you care to comment on this dilemma? Do you have any observations to offer us?

Mr. GARNETT. I do not know that I have much to add to what you just said, Senator. I share your view that the Doe case was wrongly decided, and I also am inclined to agree with your view and with my colleague, that the endorsement test leads to a danger of unprincipled ad hoc decision making.

Chairman CORNYN. Professor Rogers, I am sorry. Did you have something else you wanted to add?

Ms. ROGERS. I think these tests do have to be sensitive to their facts, and I should say that no test of the Court is perfect to be sure. But the point of the endorsement test, as Justice O'Connor has said many times, is to ensure that government does not make one's religious affiliation affect one's standing in the political community. I think that is a good principle.

These factual situations have to be considered in making that evaluation, but I would disagree with you that there is not any way to sort of figure out where the safe harbors are, and I do not think the safe harbors are just in "oh, go talk about your religion somewhere else." No, the safe harbors are not just that. There are more safe harbors for people to use to express their religion in public schools and on government property because we have had enough decisions using these tests to—we cannot decide every case in advance, we cannot predict every case in advance, but I think we can lay down some certain principles that can be used by government officials. When you referred in your opening remarks to the government officials, I just find that my experience overwhelmingly is there, that they are not hostile. They are simply scratching their heads a little bit and trying to say, what does this mean? When you have a time to sit down with them and provide them with some of the guidelines that various ones of us have worked on, they find that they are much better able to apply the law, and that creates a situation in which people are actually able to enjoy their rights and avoid lawsuits. I think we can make a certain substantial amount of progress building on the projects of the past to help government officials understand this law better.

Chairman CORNYN. I guess what makes me skeptical of what you say is the fact that we have so many given examples of people engaged in litigation, and indeed, these are the people who have had the money and the resources to fight the discrimination against their free exercise of religion, and I wonder how many others have simply, as I think one witness said, just caved in, and I worry about it. But while you say the endorsement test and coercion test do provide some predictability in this area of the law, I wonder, for example, where in the world did the endorsement test and the psychological coercion test come from? I do not see those words in the First Amendment. These are judge-created tests and it seems like the Supreme Court has gotten itself in such a box that it literally cannot find its way out.

I am sympathetic to Professor Muñoz's statement that the Ninth Circuit has written a relatively straightforward opinion striking down the Pledge of Allegiance following the United States Supreme Court's jurisprudence, which demonstrates how messed up it is.

I see my time is up, so I am going to turn the floor over to Senator Feingold.

Senator FEINGOLD. Professor Rogers, Senator Shelby testified in the first panel, proposes that all U.S. Federal Courts, including the Supreme Court, be stripped of any jurisdiction over cases involving allegations of government misconduct where the entity, office or agent acknowledges God as a sovereign source of law, liberty or government. He also proposes that any decision in the Federal Courts in cases of that sort, even those decided in the past, no longer be binding precedent on the State courts.

This proposed bill is clearly directed toward the Pledge and Ten Commandments cases and shows the Senator's intent to effectively nullify any ruling that the Supreme Court might deliver in the future.

Could you please comment on what effect his proposal would have on protections of religious liberty generally in our country?

Ms. ROGERS. I think that proposal would hurt religious freedom. I think that we need to have the courts look at these issues. They need to be able to evaluate them. One of the things I put in my testimony, which by the way, I should have asked be included in the record, was all the things that the courts have done to recognize the way that religion can be expressed in the public square. If we tie the courts' hands on these issues, I think we will get a lot more situations that will involve government endorsements and governmental promotion of religion, and that is a religious liberty problem too. It is not good for the government to be promoting religion. When the government promotes religion it begins to control religion, it begins to evaluate religious doctrine, it begins to many times dumb down religion, make religion something that is not powerful, that does not respond to God, but responds to earthly powers. I think that this is a real problem, not just for those who would say, "Look, I do not want the government telling me something religious because I am not religious." I think religious people should be very concerned about government promoting religion. It is a harm to religion, and a way to undermine its strength I believe ultimately.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman CORNYN. Senator Sessions.

Senator SESSIONS. Sorry, I had to be in another meeting for a few minutes.

I do not know where we are going with all of this, but I agree with you, Mr. Chairman, that the Supreme Court is confused, and when we have the Senate commence every day with a prayer by a paid chaplain, and when you look right out of that chair and onto the wall it says, "In God we trust," in the wall of the United States Senate. And then we are told a little child cannot pass out a pencil that says "Jesus loves me" on it, and we cannot have the Pledge of Allegiance. It just realizes that we are confused.

Mr. Muñoz, I remember the night the Ninth Circuit rendered its ruling, and the leaders of the Democratic Party raced down to the

floor to denounce the Ninth Circuit and how bad the law was and all this, and I remember saying that night that I was not sure that they were that far away from much of the precedent of the U.S. Supreme Court because it is so messed up.

How can we get out of this? We do not need these confused standards it seems to me. I remember, Mr. Chairman, former Attorney General of the United States Griffin Bell, under President Jimmy Carter, was in Alabama in a State Bar Association, and he was asked a question about, really he was asked a question about President Reagan's nominees, and they thought he would be critical of them, and he walked up to the microphone and shocked everybody. He said, "Well, we do not need a judge on the Supreme Court, on the Federal Bench that does not believe in prayer at football games." I mean why does anybody care if somebody has a voluntary prayer at a football game? Are they going to send in the 82nd Airborne? I mean this is something that really you do not have to bow your head. If it means something to somebody to have a blessing for the senior citizens in Texas, to have a blessing before they have their meal, who is concerned about this? Of what great threat to liberty is this? They are in a senior citizens center, Federal and State money I suppose helped fund it, so now they cannot say a blessing? So really I am just confused.

And these legislation by Senator Allard and Senator Shelby represent real frustration with the state of the law. The American people ultimately control this country. It is not the Federal Courts. They do not get to set policy in America. They are required to enforce the constitutional provisions, and I think they are out of sync with it really.

Having said all of that, I am not sure what my next question would be.

[Laughter.]

Senator SESSIONS. Why can we not get back to the way we ran this country for 150 years? If people should show respect for one another's religion, if people continue to be offended, as a gentleman was here, by sectarian prayer, although it is not an excessively sectarian prayer. Jesus was Jewish and it was fundamentally a Jewish prayer. But at any rate, it was a prayer that concerned him, and they kept doing it so much that it represented a concern in a public event, and it is good to listen to your concerns, but if nobody is upset about this, are we not creating too much Federal Government influence? Can we not draw back and allow people to behave naturally and only assert the governmental interest in serious cases? Can you all briefly give a comment on that?

Mr. GARNETT. There is a lot to address there, Senator. On the question of endorsement though, you raise an important point. You ask what can we do? I suggest two things. The first would be to remember that as much as we should worry about government endorsements that might be coercive of religion, there is a flip side to that coin which has come up in several cases, and Justice Thomas has been very eloquent about this, that you do not want to communicate to children that their religious beliefs are disfavored. You do not want to communicate to children that the State endorses aggressive secularism. Neutrality has to be a two-way street, and I think some of the cases you heard about today suggest that citizens

and particularly children are getting the wrong message from government action, so that might be one place to look.

Another place, and my colleague Professor Muñoz has talked about this, one problem with the endorsement test and also the coercion test is they get judges in this tricky business of trying to gauge what is going on in people's psyches, you know, do people feel excluded? Do people feel coerced? Would the reasonable person perceive an endorsement.

Senator SESSIONS. With regard to Judge Moore, they got into his head. They tried to figure out what he was intending when he put the Ten Commandments there, rather than really precisely the impact of a display of the Ten Commandments in a courthouse. Excuse me, go ahead. It just makes it complicated and difficult.

Mr. GARNETT. One improvement on the doctrine might be—and a lot of scholars have tried to make this point—that the Court might be better off to look objectively at what the government does, rather than at the subjective reactions of various people to the government conduct. That might give us brighter lines in these areas. How that would play out in Judge Moore's case, I am not completely sure, but I do believe that the endorsement test, one reason why it has sometimes led us astray is because it is not anchored in anything other than subjective reactions to government action.

Senator SESSIONS. Professor Rogers.

Ms. ROGERS. Thank you. Two things. One is, on the equal access point, I think the Court has come to sort of a critical mass in saying that equal access is constitutional in the schools, and with the Good News Club, they have applied it also to community use of government property, which would cover Mr. Clark's situation, as I understand it.

So I think a lot of good could be done right now in the wake of the Good News Club case to say, look back at the Mergens case, equal access law and Good News, and say, Listen, there is basically an equal access principle. It is actually not that complicated. If you open up a forum on government property to many different groups and have first-come first-served rules, then you can let religious groups use that space, and you just have to be careful that you are not giving it only to the Christians or only to the religious groups. That will not work.

But what we say is, we understand that that is not—the law understands that that is not government endorsement of religion just because it is on government property. That is a fairly clear rule, and would curb almost—I have not counted up the examples here, but I think quite a number of these would be done away with just by clarifying that rule for people who administer government property, whether it is school superintendents or people who run senior centers.

So I would say that a lot of progress could be made right there.

Senator SESSIONS. But you would say then that if the senior citizens voted to singing "You Are My Sunshine," and the second most popular song they wanted to sing was "Shall We Gather At The River," they could not sing—

Ms. ROGERS. No, no, that is fine. They can do whatever they want in an equal access situation, and that is precisely why I am so supportive of it.

Senator SESSIONS. Equal access, let us go back to this. I am talking about a group of people that come to that center. One of them may be Muslim. One may be Jewish, and 95 may be Christian or do not care, and they are happy to sing "Shall We Gather At The River?"

Ms. ROGERS. Thank you for that. That is helpful. What I am thinking of is in a senior center—and I have helped somebody work on this before—that the senior center that is city-owned should essentially form clubs. There would be the club that would get together and sing spiritual songs and hear from a pastor. There would be another club that might talk about chess or they might talk about fishing or something else that is of interest to them. But it would be the equal access model applied to a community setting, and I think the Good News Club makes that possible, that case, and that is an excellent way to solve it because then you do not have the government coming in and say, that is a little too proselytizing, that is a little too sectarian, no. They can do what they want to do, but it is not endorsed by the government.

Senator SESSIONS. The government just does not need to come in and say those things. If that is what they want to sing, let them sing it.

Ms. ROGERS. I agree with you on that point.

Senator SESSIONS. No. You are saying that you have to have separate groups and then they can sing whatever they want to sing, and what, if they sit in one corner of the room, they have a blessing, and if they do not sit in that corner they cannot have a blessing?

Ms. ROGERS. No. I think they should structure it in an equal access situation so that the groups have times to meet and do what they want to with no government interference.

Senator SESSIONS. But you are saying that they have to separate themselves unless everybody agrees, and that no general public announcement of any gathering at the senior center can have any hymn or prayer.

Ms. ROGERS. I would say that the senior—

Senator SESSIONS. Any general announcement to the public.

Ms. ROGERS. I would say that the senior center itself, what it does as an official duty should not be to promote religion or endorse religion. What it should do is say—

Senator SESSIONS. I am not talking—excuse me. I do not want to argue, but—

Ms. ROGERS. That is okay.

Senator SESSIONS. Go ahead. You are doing well and I should not interrupt.

Ms. ROGERS. That is all right. What I think would be most productive and that I helped somebody encourage this, and I believe the system was instituted, was they called all the—the officials called everybody together at the senior center and said, we have groups that would like to pursue different things on senior center property, city-owned property, and we would like to give everybody the opportunity to do that, so what we are going to do is allow everybody to organize their own groups with what they are interested in, whether it is gospel singing or fishing or cooking, and we are going to have this room available to your clubs on a first-come first-

served basis. You sign up. You can use the property. In fact, if you get us a notice of your meeting, we will put that notice out just like we would for the chess club or the fishing club.

We are not going to say this is something we are endorsing or running. This is your club, this is your property. And that negates any sense of Government promotion or endorsement of religion.

Senator SESSIONS. Well, you know, that is just very unsatisfactory to those of us in public life. It may be theoretically fine with you, but it is not practical in the real world. I am just telling you, what people believe they have a right to do is somebody says a blessing before they have a meal at the senior center, is not an establishment of a religion, I don't think. I don't know how we get at this deal.

Mr. Muñoz?

Mr. MUÑOZ. I think this shows the problem with the endorsement test. With the test, as the Supreme Court, as Justice Sandra Day O'Connor has interpreted the Constitution, you have to have a lawyer present in a senior citizen club to explain when and how you can pray. That is where this test leads until we get rid of the test. And let me just add the Constitution, the First Amendment, says nothing about an endorsement of religion. It is not that complicated. The Constitution says, "Congress shall make no law respecting an establishment of religion." An establishment of religion is different from an endorsement of religion. We have replaced the Constitution's text with an idea of endorsement which is inherently confusing and ambiguous, which leads to litigation, lawyer-dominated senior citizen clubs, and general hostility towards religion. That is our problem, and until we return to the text of the Constitution, all this is going to continue.

Senator SESSIONS. Well, I saw the little Muslim girl that was so wonderful earlier. You know, if a group of people—I believe in my school in the little town I went to in Alabama, if their faith called on them to pray two or three times a day and they had to do so in a certain fashion, I believe the school would have made accommodations to them. I believe they would have allowed them to do this. And we go on in a natural, commonsensical way like we did for 150 years trying not to offend people, to take seriously other people's differing views. But I don't think most people are offended if somebody has a slightly different theology than they do and they express it in a prayer that is different than my theology or something. But we are tolerant people.

Mr. GARNETT. Senator, you mentioned your school in Alabama and how they would be willing to accommodate. Yet another area where the doctrine, the common law could really be improved is if everybody realized that it is not an establishment of religion to accommodate religion. There are some scholars and some Justices who seem to be under the misimpression that if you accommodate, you are establishing. And that is certainly not the case and I think, again, an area where we could do better, and the law would be to make that clear.

Ms. ROGERS. But I would also say that the Court has found in the Amos case—and I know Rick is familiar with this case. They found that the Title VII accommodation that allows churches to

hire and fire on the basis of religion, that that is appropriate accommodation.

I would just go back—I actually believe that the principles that I described with the senior citizens, as far as I know, they were implemented in this one situation because it was before the Good News Club. And I remember thinking I think I can help someone come up with a policy here that allows robust religious expression and is also constitutional. So I would disagree or would beg to differ to say that these principles aren't practical. I think that there is a lot that can be done to help Government officials understand this equal access principle and to allow robust religious expression in public spaces.

Senator SESSIONS. What if you had an agreement at the senior citizens center that the 95 people who wanted to sing a hymn and say a blessing would get the biggest room when they got their meal and the people who didn't want to would be given a smaller room?

Ms. ROGERS. That would not be good legal advice, I don't think, to give to anybody.

Senator SESSIONS. Why not?

Ms. ROGERS. Well, that sends a very strong message about—

Senator SESSIONS. That is what you are saying, if you get the room—you get the room, you can have a room and ask for it, and you can have your religion.

Ms. ROGERS. It sends a strong message to people who are given a closet and the other people who are given the main auditorium—

Senator SESSIONS. Maybe it is a nice room.

Ms. ROGERS. What?

Senator SESSIONS. Maybe it is a nicer room.

Ms. ROGERS. You are bringing it up some for me here. But I think that it has to be on a first-come, first-served basis. It has to be, you know, basically equal kind of settings that they would provide, or you are expressing favoritism for perhaps one religion over another in that situation, or perhaps religion over non-religion.

Senator SESSIONS. You give people who need the largest room the larger room and the people who need the smaller room with a different—

Ms. ROGERS. That might be—I think now we are getting back in territory that is safer when you say, well, you only have 12 people so you don't need it. So it is a non-discriminatory reason. I am sorry. I misunderstood you. Then if it is a non-discriminatory reason, that makes sense. But one of the things that I just want to follow up on before we leave that point is I really do sincerely believe that to have Government promoting religion hurts religion. And one of the things that I remember—John Leland, a Baptist minister back in the founding days of our country, I think it is important for us to remember when we are talking about especially with the faith-based initiative, with the Government funding, sending grants and contracts to churches. What the Government funds it regulates, and this is going to become a situation where churches are closely regulated by the state. And not only that, but Leland would often recognize that this Government—this religious dependence on Government to run its programs ended up corrupting religion. And he said in one of the quotes, "The great doctrines of universal depravity, redemption by the blood of Christ, regeneration,

faith, repentance, and self-denial, are seldom preached by these churches that are funded by the government. They just are things to them, of course." That is what he says, these great doctrines become something that aren't vital anymore. They just become something that are things to them.

And so I think it is really important to remember, especially when we are talking about Government grants and contracts with churches, that the Government is going to regulate the churches; the Government's funding of them is going to create a dependence of the churches on the Government. And I believe in the end that creates for us a situation in which churches and religion are more creatures of the state than creatures of God. And that is a problem.

Senator SESSIONS. I am sorry, Mr. Chairman. I went over my time.

Chairman CORNYN. Well, this has been a fascinating discussion, and if it were up to me, we could continue for a lot longer. I am sure we wouldn't solve all our problems, but it has been fascinating and I appreciate the contribution each one of you has made.

What I worry about is that what we are telling people across the country is, yes, there are some rules, but if you have the time and the money to hire a lawyer to help you figure it out and give you legal counsel so you can conform your conduct in a way that, yes, you might probably win a legal challenge that goes all the way to the United States Supreme Court, you might be all right. But if you don't, then the easiest thing for you to do is just to leave and vacate this public arena where I believe that there are many people who are frustrated that the public arena in America and across the world today are full of all sorts of messages from sex to violence and the like. I know it is a big frustration on the part of parents. You can talk about just about anything except your faith because of what I view to be somewhat contradictory rules that have come out of the United States Supreme Court.

And I agree with Senator Sessions—I believe it was Senator Sessions who said some of the legislation that you have seen and that Senator Shelby and others have talked about in terms of jurisdiction stripping are a manifestation of the frustration that we feel on behalf of our constituents for how do we get ourselves out of this box. It is unlikely that the members of the United States Supreme Court, once they have embraced a test—which is, in my view, wholly made up, but it is, nevertheless, their test and they are going to use it every time a case goes to the Supreme Court. How do we get ourselves back to some sort of practical, predictable understanding of what the rules are so that people can understand what is required of them and what the rules are and then conform their conduct in a way that lets them avoid litigation and yet respects their right to express—to speak their religious views or faith in a public forum.

So I would just ask in closing for our legal scholars here to continue to think about these issues, and if you have anything you would like to share with us by way of suggestions or ideas—part of the problem is, of course, because these are constitutional tests, it is hard for the legislature to make much of a dent in this sort of thing. But maybe there is a role you can think of for us to play in trying to find a way out of this thicket.

Senator SESSIONS. Mr. Chairman?

Chairman CORNYN. Senator Sessions?

Senator SESSIONS. There was one question I meant to ask and wanted to ask that was about the Boy Scouts. I was a member of the Boy Scouts. And they don't really practice religion, but they have certain moral principles and a belief in God. On my oath, I will do my duty to God and my country. Obey the Scout laws. Help other people at all times. They are getting—what do you call it?—hostilized in the public square. So I might do that in writing. I don't want to go into any long thing, but if any of you had a brief comment, Mr. Garnett or—

Mr. GARNETT. If you are referring to the case out in California where the Boy Scouts lost their lease on public land because they were deemed to be a religious group, I guess I share your reaction to it. It strikes me as a mistaken action. The Boy Scouts are a private association that enjoy First Amendment rights to express themselves and to embrace the messages that they like to. And San Diego is not establishing a religion merely by permitting the Boy Scouts to do their thing on public land.

Senator SESSIONS. And that was the peg they hung it on, establishing a religion. I remember, Mr. Chairman, before you came to the Senate, not long after I did, the Washington Zoo would not allow the Boy Scouts to have a Court of Honor, at the Washington, D.C., Zoo because of their affirmation of faith, apparently, or maybe their standards of behavior they expected of their scoutmasters. But they did it on, I think, separation of church and state and backed down after Eagle Scout Senator Mike Enzi started up and questioned it and challenged it, and they finally retreated. We are off base here somewhere.

Mr. Muñoz, did you want to comment?

Mr. MUÑOZ. This is the problem, what you are pointing to is the problem with the endorsement test, because Government cannot endorse religion. Well, if we allow the Boy Scouts who promote this moral code to meet on our grounds or if we acknowledge the Boy Scouts in some way, someone might think we are endorsing religion and, therefore, we need to keep them out of the public arena. And that is the logic of the endorsement test. And because, look, you can get sued, better just to avoid the whole thing, better to keep the Boy Scouts away, and that way we won't get sued, and that way we won't face litigation. And because it is so easy to sue under these standards and have a real case under these standards, that is what leads to hostility in the public square, hostility against the Boy Scouts, or anyone else who expresses religious sentiment.

Chairman CORNYN. We will have to end there.

In closing, I would like to thank all the panelists and the Members of the Subcommittee who have been here today, and also to thank the Chairman, Chairman Orrin Hatch, for scheduling this hearing, and Senator Feingold for his usual cooperation and dedication.

As I stated earlier, we will leave the record open until 5:00 p.m. next Tuesday, June the 15th, for members to submit additional documentation or ask questions. I would also say if there is additional written testimony or other things that witnesses would like

to tender, we will also make those part of the record if they are relevant to what we are talking about.

With that, this hearing of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights is adjourned.

[Whereupon, at 5:24 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

# QUESTIONS AND ANSWERS

**Honorable Roy S. Moore's Response to**

**Written Questions of Edward M. Kennedy**

**Senate Judiciary Committee Hearing**

**"Beyond the Pledge of Allegiance:**

**Hostility to Religious Expression in the Public Square"**

**June 24, 2004**

In response to your written questions of June 15, 2004, I respectfully submit the following:

**"As you know, religiously affiliated organizations have long received government funds to operate social services, although they had generally been constrained to do so in a non-discriminatory manner. I am interested in your views regarding the legal requirements applicable to religious organizations when administering federally funded services.**

**"1. In your view, may the government directly fund a church or other religious institution?"**

First, it is arguable whether Congress has the power to fund any social programs, whether through religious institutions or any other kind of organization. While Article I, § 8, clause 1 of the Constitution permits Congress to "lay and collect taxes" in order to "pay the debts and provide for the common defence and general welfare of the United States," it is likely that the "general welfare" clause is not synonymous with "social welfare" because absolutely no programs for social welfare were funded by the federal government until the late 1930's, after the Supreme Court began to stray from reading the Constitution according to its actual words. Neither can the "necessary and proper" clause, Article I, § 8, clause 18, reasonably be interpreted to permit such funding. This clause grants what are known as "implied powers," that is, powers necessary "for carrying into execution the foregoing powers" explicitly expressed in Section 8. Article I, § 8, clause 18. As Alexander Hamilton explained it: "[I]t is *expressly* to execute these powers [of Congress], that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all *necessary* and *proper* laws. If there is any thing exceptionable, it must be sought for in the specific powers, upon which this general declaration is predicted. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless." *The Federalist*, No. 33 (emphasis in original). In other words, the "necessary and proper" clause provides Congress the means necessary to carry out the powers granted in the foregoing clauses of Section 8, *see, e.g., The Federalist*, No. 44 (James Madison), and, therefore, it arguably does not give Congress separate sanction for funding social programs because such funding would not achieve any of the express powers listed in Article I, § 8.

However, if we assume that Congress does have the authority to fund such programs, directly funding a particular religious institution would violate the Establishment Clause of the First Amendment. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." An "establishment," as I stated in my written testimony to the Subcommittee, is "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (*reprint* 1998) (1891). Prevention of a single church, denomination, etc., from receiving federal government backing at the expense of all others, including the established churches that existed in the states at the time, was the basic reason the Founders crafted the Establishment Clause.

**"2. Do you believe it is permissible for the government to fund religious programs? If so, under what circumstances?"**

By "religious program" I presume you mean a program run by a church or religiously-affiliated organization such as the Salvation Army and Prison Fellowship Ministries. The First Amendment would not prohibit giving taxpayer funds to such "religious" organizations because such funding would not constitute a law "respecting an establishment of religion." In 1854, the House Judiciary Committee, in a report concerning the constitutionality of employing a chaplain for Congress and chaplains for the military, Congress concluded that an "establishment of religion" "must have a creed defining what a man must believe; it must have rights and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist." H.R. Rep. No. 124 (1854). Religious organizations such as the Salvation Army and hundreds of others do not have these characteristics and therefore do not qualify as "establishments of religion." Moreover, so long as programs run by organizations that associate themselves with one particular religion are not specially favored by the government over programs run by organizations that associate themselves with other religions, there is no conceivable way that such funding could violate the First Amendment.

If you mean by "religious programs," however, such things as prayer in schools, displays of the Ten Commandments on public property, and so forth, then I refer you to my earlier written and oral testimony to the Subcommittee in which I explained that there is a distinct difference between "religion" and acknowledgments of God by government. Acknowledgments of God are not forbidden by any provision of the Constitution, and indeed, are vital to our national character. Indeed, as Joseph Story observed in his *Commentaries on the Constitution* with regard to the meaning of the First Amendment, "[t]he promulgation of the great doctrines of religion, the being and attributes, and the providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent

virtues—these can never be a matter of indifference in any well ordered community." J. Story, 3 *Commentaries on the Constitution* § 1865 (1833). Therefore, government funding of such "programs" is perfectly permissible.

**"3. Do you believe the government may ever allow a religious organization to practice employment discrimination based on religion in programs and positions financed by federal funds? If so, on what basis, and in which circumstances?"**

Since the federal government is funding all manner of social programs and services, it must not discriminate against religious organizations that provide such programs and services regarding their hiring practices. For the government to tell an organization whom it can and cannot hire and fire based on the beliefs of the employees and potential employees is to violate the freedom of the organization to exercise its religion. James Madison said that "'religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.' (Virginia Declaration of Rights, Art. 16). The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." J. Madison, *Memorial and Remonstrance, reprinted in American State Papers on the Freedom of Religion*, at 112-13 ((William Blakely, ed.) (1949). Government has no jurisdiction over the consciences of the people to tell them what they can and cannot believe or with whom they can and cannot associate based on those beliefs. As the Supreme Court has explained, "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). "Government actions that may unconstitutionally burden this freedom may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'" *Boys Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts*, 468 U.S. at 623). To deny a religious organization the right to make employment decisions based on religious belief is to strike against the very core of such an organization, whether it be a church or an organization not directly associated with a church that nonetheless holds to specific religious tenets. Denying federal funding to religious organizations simply because they hold to their religious beliefs or dictating to religious organizations what they must believe once they accept federal funds is discrimination *against* those organizations based on religion even while the government proclaims to be a neutral party among the myriad of religions and opinions held by individuals and organizations in this country. Such organizations should not be forced to forfeit their religious identity or core principles to receive public funds that would be otherwise available to them.

Response to Questions from Senator John Cornyn

By Vincent Phillip Muñoz

Senate Judiciary Hearing
"Beyond the Pledge of Allegiance:
Hostility to Religious Expression in the Public Square"
8 June 2004

**1. During the hearing, it was suggested by some that—notwithstanding the countless examples articulated by various witnesses—hostility to religion expression in the public square does not really exist in America. It was suggested that the examples of such hostility are few, and that the examples typically reflect ignorance of the law and good faith attempts to comply with the law, rather than actual, outright hostility towards expressions of and exercises of faith.**

**a. Do you agree that hostility to religious expression is rare in our country?**

Residents in the United States enjoy widespread religious freedom. Unfortunately, incidents of hostility toward religious expression in the public square are also commonplace.

**b. Can you provide examples of hostility to religious expression—including examples of judicial decisions, litigated cases, government actions (including actions by public schools and other local governments), law review and other academic writings, media stories, or any other examples?**

The following are recent examples of the types of hostility toward religious expression in the public square faced by religious citizens. The list below is meant to be illustrative only. The number of similar such instances that occur every year is significant.

Prohibition of private religious exercise in public spaces:
On Sunday, May 23, 2004, park officials in Stafford County, VA told Rev. Todd Pyle of Cornerstone Baptist Church that he could not baptize individuals in Falmouth Waterfront Park because religious activities were not allowed. Rev. Pyle had just performed a series of 12 baptisms in the Rappahannock River, which borders the park.

Censorship of Religious Speech at Public School Graduation Exercises:
In Minnesota in the spring of 2003, officials of the Truman Public School District prohibited Maria Woolle from quoting Jeremiah 29:11 as part of her salutatory address. ("For I know the plans I have for you," declares the LORD, "plans to prosper you and not to harm you, plans to give you hope and a future.") – [allowed after the threat of a lawsuit]

In April 2003, Anna Ashby, a senior at Windsor High School in Windsor, Va. was prohibited from singing the Celine Dion song "The Prayer" because contained religious lyrics. Ashby was chosen by her classmates to perform, but Dr. Michael McPherson, superintendent of Isle of Wight County School District, instructed school officials to inform Ashby and her classmate that allowing her to perform the song would violate the school's policy on the separation of church and state.

In May 2003, school administrators ordered Winneconne High School senior Rachel Honer to use the words He, Him and His instead of three mentions of God in the lyrics of the song she planned to sing at graduation. If she didn't comply, she was told, she could not sing. [She filed a federal lawsuit, and the district reversed itself, saying she could sing the song with its original lyrics, but could still not mention "God" in her introductory remarks.]

Elimination of Religious symbols from the public square:
In June 2004, the Los Angeles County Board of Supervisors caved into pressure by the ACLU and agreed, in a closed-door meeting, to remove a small cross from the LA County seal. The cross was adopted in 1957 to represent the Spanish missionaries who founded the Los Angeles Country missions during the 18th Century. Other images on the 47-year-old seal include a cow, a tuna, a Spanish galleon, the Hollywood Bowl and the goddess Pomona cradling an armful of fruit.

Elimination/Prohibition of prohibition of religious references in the public square:
In November 2001, King County, Washington executive Ron Sims sent a memo to all King County employees requiring that all workplace holiday celebrations remain "religion-neutral." The memo includes examples of neutrality, such as, "naming the celebration(s) 'Holiday Celebration' or 'Winter Celebration'; using general greetings such as 'Happy Holidays' or 'Holiday Greetings'; using decorations that are commonplace — poinsettias, evergreen boughs, lights — but not using religious symbols nor (sic) practices."

The posting of the Ten Commandment has been prohibited by several state and federal courts. Notably, in 2003 the 6th Circuit Court of Appeals in *ACLU v. McCreary County* prohibited the display of the Ten Commandments in Kentucky public schools and county courthouses, even when the displays included other notable historical documents, including portions of the Declaration of Independence; the Kentucky Constitution's preamble, "In God We Trust"; a page from the 1983 Congressional Quarterly referring to the "Year of the Bible" and reprinting the Ten Commandments; a proclamation by President Lincoln establishing a Day of Prayer and Humiliation; Lincoln's statement, "The Bible is the best God has ever given to man"; President Reagan's labeling 1983 as the Year of the Bible; and the Mayflower Compact. [The case is currently on appeal before the Supreme Court with a companion case, *Van Orden v. Perry*.]

It must be understood that hostility toward religious expression in the public square often results from good faith attempts by public officials to follow existing Supreme Court Establishment Clause precedents. Most notably, the Supreme has ruled that state actors may not "endorse" religion over irreligion (see, for example, *Santa Fe Independent School District v. Doe* (2000)—prohibiting a Texas public school district policy that permitted, but did not require, student-initiated and student-led prayer at high school football games). The Court has failed to set forth clear guidelines to explain what constitutes an impermissible "endorsement" of religion. Public officials, accordingly, in an effort to prevent litigation, have an incentive to suppress all religion speech, as any religious speech in the public square might be perceived by some to constitute state-sponsored "endorsement" of religion.

Leading Supreme Court decisions that have been hostile to religious expression in the public square include:

*Stone v. Graham* (1980)—striking down a Kentucky law that required public schools to post the Ten Commandments.

*Wallace v. Jaffree* (1985)—striking down an Alabama public school policy that mandated "a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer."

*Allegheny County v. ACLU* (1989)—finding unconstitutional the display of a crèche in a county courthouse because it was not surrounded by other, more secular displays.

*Lee v. Weisman* (1992)—prohibiting school sponsored religious benedictions and invocations at public high school and middle school graduations.

*Santa Fe Independent School District v. Doe* (2000)—prohibiting a Texas public school district policy that permitted, but did not require, student-initiated and student-led prayer at high school football games.

**c. Can you provide examples of organizations that actively litigate or file amicus briefs or otherwise advocate views contrary to freedom of religious expression in the public square?**

The American Civil Liberties Union and Americans United for the Separation of Church and State frequently introduce and/or support litigation that encourages and results in hostility toward religious expression in the public square.

**2. Do you believe the Equal Access Act of 1984 is working well?**

I have not closely studied the Equal Access Act of 1984, and thus will refrain from commenting on how well it is working.

Response to Questions of Senator Edward M. Kennedy

By Vincent Phillip Muñoz

Senate Judiciary Hearing
"Beyond the Pledge of Allegiance:
Hostility to Religious Expression in the Public Square"

23 June 2004

The questions request my views on the "legal requirements applicable to religious organizations." Let me make clear that my responses are in reference to the constitutional limitations imposed by the First Amendment's Establishment and Free Exercise Clauses. What is "legally required" (e.g. by State or Federal law) is different from what is "constitutionally allowed." As my testimony focused on the original meaning of the First Amendment's religion clauses, my answers will focus on the requirements and prohibitions imposed by the Constitution.

**1. In your view, may the government directly fund a church or other religious institution?**

The First Amendment's protection of religious liberty has traditionally been understood to prohibit direct government funding of churches or religious institutions *as such*. An example of a policy that would clearly violate the First Amendment would be a federal law that offered grants to churches specifically to pay for the construction of houses of worship or the payment of clergy. Stated simply, to pass constitutional muster, government funding must, at minimum, be tied to a "secular legislative purpose."

**2. Do you believe that it is permissible for the government to fund religious programs? If so, under what circumstances?**

The Constitution's Establishment Clause and Free Exercise Clause do not prohibit religious organizations from participating along with non-religious organizations in government-funded programs. To pass constitutional muster, all government programs must have a non-religious legislative purpose (e.g. civic education, reduction of poverty, etc.). As long as faith-based organizations' participation in government-funded programs support the secular purpose aimed at by legislation, they may participate in such programs. The participation of faith-based organizations in such programs does not, *de facto*, make such programs inherently religious or constitutionally suspect.

The primary constitutional question that should govern faith-based institution's participation in government funded programs is: Does such participation foster the non-religious legislative purpose set forth by the government funded program.

The Constitution forbids the government from discriminating against religious organizations as such in its funding decisions. That is, a faith-based organization cannot be excluded from a generally available program on account of religious affiliation. The Constitution also forbids government discrimination against non-religious organizations on account of their lack of religious character. The constitutional norms in matters of federal funding are equal access and non-discrimination on account of religion.

**3. Do you believe the government may ever allow a religious organization to practice employment discrimination based on religion in programs and positions financed by federal funds? If so, on what basis, and in which circumstances.**

The First Amendment religion clauses do not reach questions of employment hiring for organizations that receive government funds. Employment practices by private associations, including religious organizations, are governed by State and Federal law alone. It is permissible under the First Amendment for religious organizations to have employment practices that reflect their organizations' spiritual character.

# LIBERTY LEGAL INSTITUTE

KELLY J SHACKELFORD
Chief Counsel

HEADQUARTERS
903 East 18th St. Suite 230
Plano, Texas 75074
972-423-3131 Fax 972-423-8899
libertylegal@libertylegal.org
www.libertylegal.org

HIRAM SASSER*
Director of Litigation

*Also Licensed in Oklahoma

October 8, 2004

The Honorable John Cornyn
Chair, Subcommittee on the Constitution
517 Hart Senate Office Building
Washington, D.C. 20510

Re: *Answers to Questions- "Hostility to Religious Expression" Hearing*

Dear Chairman Cornyn:

Thank you for your leadership and foresight in addressing the important issues of Hostility to Religious Expression in the Public Square. My answers to your questions are as follows:

*Questions 1*- No, we do not agree with the few in the hearing who suggested that hostility to religious freedom is not an issue in this country. Hostility to religious expression is real and much too frequent, to an extent that would be shocking to most Americans. Exhibit A (attached) is a long list of cases, over 50 pages worth, reflecting religious hostility across America. These cases just scratch the surface of what is happening across the country. The sad truth, in addition, is that most people suffering discrimination simply quietly accept it without ever raising an objection. For ever case actually prosecuted, there are nine others silently suffering hostility to their religious expression.

Regarding your question of organizations who, in our opinion, actively litigate against religious freedom, the American Civil Liberties Union, People for the American Way and Americans United for Separation of Church and State are the leaders, constantly battling against expression of a religious viewpoint in the public square. Many of their attacks are noted in our 50 plus page list of cases. For example, in *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), the American Civil Liberties Union, People for the American Way and Americans United for Separation of Church and State filed *amicus curiae* briefs advocating the suppression of speech from a religious viewpoint for all elementary school children.

Regarding *Question 2*, I do believe the Equal Access Act is working fairly well. The Act's protections against discrimination, however, should also be extended to protect children in all schools, not just secondary schools. Discrimination against children based on their religion is really hurtful and damaging, no matter what the age of the child.

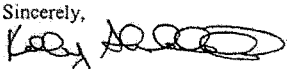
Remedies and enforcement mechanisms are not currently adequate to protect people who suffer violations of their rights to religious expression. The main problem is a natural one- there are no real damages for the loss of precious constitutional rights, no money amount, and thus government officials will often continue in their violation, knowing there will be little monetary risk. This can be remedied by providing real damages to religious freedoms victims. I would suggest, for instance, that victims receive statutory damages equal to the amount of hours the government's attorneys spent fighting against their freedoms times the highest reasonable rate charged in that community. There would now be some incentive for government to at least stop a continuing violation.

Ability to recover attorneys' fees is also a serious problem. As stated above, there are no real actual damages in these cases. Attorneys are thus reticent to take these cases, since they offer little remuneration. The only encouragement is that they may at least be able to recover their attorney's fees if they win. The way things are currently working, however, discourage even this. Attorneys who are successful in protecting the religious freedoms of civil rights victims are usually met with aggressive and often personal attacks when they seek to recover their fees. After all, the very government attorneys who were beaten in the case now get to go after the opposing attorneys who beat them and get to do all they can to reduce their recovery. Every minute they spent representing their client is questioned and judges usually dramatically reduce their total time spent and rate recovered. Meanwhile, the government's attorneys never have to give back a penny of what they were paid, for each hour, *even though they lost the case*. It is no wonder it is difficult for civil rights victims to find an attorney to represent them.

I suggest that attorneys who successfully represent religious freedoms victims and restore any of their freedoms be treated more like all other attorneys are treated in the marketplace. They should submit their fees to the court, with an affidavit swearing the time spent and rate are true and correct. The time and rate should then be rebuttably presumed unless a high level of proof is offered to prove otherwise.

Hostility to religious expression is a real problem. Victims desperately need better protection in the law and the encouragement in the law to get the highest quality of legal representation, so that the Constitutional freedoms of us all are protected.

Sincerely,



Kelly Shackelford, Esq.
Chief Counsel

# LIBERTY LEGAL INSTITUTE

KELLY J SHACKELFORD
Chief Counsel

HEADQUARTERS
903 East 18th St. Suite 230
Plano, Texas 75074
972-423-3131 Fax 972-423-8899
libertylegal@libertylegal.org
www.libertylegal.org

HIRAM SASSER*
Director of Litigation

*Also Licensed in Oklahoma

October 8, 2004

The Honorable Edward Kennedy
United States Senate
317 Russell Senate Building
Washington D.C. 20510

*Re: Answers to Questions- "Hostility to Religious Expression" Hearing*

Dear Senator Kennedy:

Thank you for your questions regarding federally funded services applicable to religious organizations. My answers to your questions are as follows:

While the government may not fund a religious institution or church for the reason that it is religious, the government also may not exclude or discriminate against religious institutions because they are religious. The government should, and constitutionally must, treat all groups the same. Under all neutral government programs, therefore, the government must provide funding to all groups who meet neutral criterion, including religious groups. Religious groups may not be the subject of discrimination.

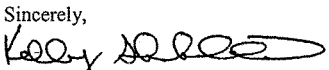
Regarding your last questions, I believe strongly that religious organizations must be permitted to follow their own religious faith in hiring, even in connection with the federal programs in which they participate. No religious group should be forced to abandon its religious character and beliefs in order to participate in a government program. Such a requirement would be a form of religious bigotry, forcing religious groups to abandon their core beliefs and philosophy in hiring and leadership, something which would never be suggested or forced upon secular groups such as, for example, Planned Parenthood.

Attempting to force religious groups to abandon their religious character in order to participate in a federal program defeats the whole purpose of these programs- providing diversity and choice to the recipients of these services in order to provide the best chance of success. Religious groups are often the most successful in these programs because they follow their deeply held beliefs, including who may be hired and be in

leadership of their organization. Stripping them of their religious character would be a huge mistake.

While all the recipients of their services should be welcome on a non-discriminatory basis, religious groups should retain every right and freedom of religion to hire and pick their leaders based on their deeply help religious beliefs. To do otherwise would violate free exercise rights, violate associational rights under the First Amendment, and would be disrespectful of the autonomy of churches and religious groups which have existed in this country for hundreds of years.

Sincerely,



Kelly Shackelford, Esq.
Chief Counsel

# SUBMISSIONS FOR THE RECORD

TESTIMONY OF BARNEY CLARK

MEMBER OF BALCH SPRINGS SENIOR CENTER

BEFORE

THE SENATE SUBCOMMITTEE ON THE CONSTITUTION

JUNE 8, 2004

ON

**HOSTILITY TO RELIGIOUS FREEDOM**

Chairman Cornyn, Ranking Member Feingold, and members of the Committee, thank you for inviting me to testify to you today.

My name is Barney Clark and I'm a member of the Balch Springs Senior Center in Balch Springs, Texas. My wife, Peggy, and I have been members for over 10 years. We started our 11th year the first of May.

It has always been a pleasure to attend the Senior Center, but that has changed in the past six to eight months. We seniors have been singing religious songs since we have been attending and I understand it has been going on for the past 20 years. We also always appointed someone to bless our food during the meal time. Brother Barton has been giving an inspirational message every Monday for over 20 years at the Center.

Back in August of 2003, after our Monday devotional time and gospel music, Debbie McDaniel, the Center Director, told us we could not sing the gospel songs, have Brother Barton give us inspirational messages, and no longer ask blessings over our food. She received these directives from the City Manager who was told this by the Balch Springs' City Attorney. This was the first time we were told that we could not participate in these voluntary activities that had been going on for some 20 years with no problems.

We were in limbo for two or three days after the City of Balch Springs put these restrictions on us at the Center. Then Liberty Legal Institute, a legal group that protects people's religious freedoms and First Amendment rights contacted us and said they would represent us free of charge. The attorneys with Liberty Legal Institute said it was not right the way we were being treated. This was a violation of our religious freedom and freedom of speech.

Our attorneys put together a letter in September of 2003 and sent it to the Mayor of Balch Springs, members of the City Council and the City Manager. The letter explained that they needed to change the policy banning us from praying, singing gospel songs, and having inspirational messages at the Senior Center or else a lawsuit would have to be filed. The letter told them that they could not ban us from these activities because it was a violation of our rights as Americans. A group of seniors from the Center, including myself, had a press conference with our attorneys telling the newspapers and television about our situation and there was lots of news about us.

The City did not reply to the letter and did not change their minds about the policy. We had no other choice but to file a lawsuit. We had 16 people who signed the agreement to have a lawsuit or go to court if necessary. These 16 people are senior citizens and members of the Center. My wife called all the councilmen and asked them to come over to the Center and talk it over with us. They all refused but two. Mr. Jones and Mr. Hall did come over and they agreed with us. The City Council met on occasion and never changed the policy either. A few days later the Mayor came over and told us we could go over in a corner and pray if we wanted to. We refused to hide like criminals.

After the insurance company representing Balch Springs became involved, they called for us to go to a mediator. Mediation was not a success. One time the Balch Springs representatives got up and walked out of the mediation, mostly because they got the wrong sandwiches – they apparently did not want to work with us very much.

We then received a letter from Mr. Norman Moorhead, Director of the Dallas Area Agency on Aging, stating our food program would be in jeopardy if we won the

case. They were going to take away our meals at the Center for standing up for our rights.

In the meantime, the Justice Department became involved with the situation. This took place in early December. After the Justice Department became involved Balch Springs threw in the towel and they gave us back all our rights to the seniors. This was January of 2004 that the City finally agreed to all the things we asked for and gave us our rights back. We are able to pray again, sing our music, and have Brother Barton teach us and give us inspirational messages. Us seniors were glad to see this happen.

But, our Director, Debbie McDaniel, can not be involved with anything to do with religion. She was a member of the gospel band that provided us with music each Monday. As a result of this, her husband, Ted McDaniel, didn't feel right playing when his wife wasn't welcomed. Consequently, we don't have our regular gospel music. Sometimes we are lucky and have some of the band play solo. Mrs. McDaniel has been the director for ten years. When she first started there was a lady, Dorothy Ward, who played gospel music on the piano each Monday. Everyone got up around the piano and sang. Mrs. McDaniel joined in on the singing as she does on all activities involved in the daily running of the center. As the Center Director this is part of her job, whether it is crafts, bingo, exercising, music, etc. As it stands now we would be satisfied if Mrs. McDaniel, our director, could once again join in the gospel music.

After all is said and done, we received another letter from the Director of the Dallas Area Agency on Aging stating that our food service was still in jeopardy, but after he talked to the lawyers at Liberty Legal Institute he backed down.

As a war veteran and proud senior who fought for our freedoms, I took part in this because I wanted to stand for my rights. I fought for these rights. It was not right for us seniors to be told that we couldn't pray or sing gospel music in a public building. More people need to stand for their rights here in this country.

You won't believe it, but the City Mayor told me actually told me that I could just "go and pray in the corner." You know what I told him? "My bible says 'profess me publicly.' I will not go and hide like a criminal. If you're going to take me to jail – take me to jail."

Senator, put my life on the line in the South Pacific some 60 years ago fighting for these rights. That's why I am here today.

Thank you for your time this afternoon.

U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senator John Cornyn (R-TX), Chairman

**"Beyond the Pledge of Allegiance:**
**Hostility to Religious Expression in the Public Square"**

Tuesday, June 8, 2004, 2 p.m., Dirksen Senate Office Building Room 226

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## OPENING STATEMENT OF SEN. JOHN CORNYN

The U.S. Supreme Court will soon decide whether the First Amendment forbids school teachers across America from leading students in the voluntarily recitation of the Pledge of Allegiance, simply because the Pledge affirms what we all know to be true – that our nation was founded "under God." [*Elk Grove Unified School Dist. v. Newdow* (2004).]

The Senate has unanimously and repeatedly condemned the Ninth Circuit's contrary ruling striking down the Pledge. A majority of the members of this subcommittee filed the first amicus brief in the U.S. Supreme Court defending the Pledge on the merits. And the vast majority of Americans agree with the Senate – rather than with the Ninth Circuit and the ACLU – on the constitutionality of the Pledge.

But however the Court ultimately rules, the Pledge case reminds us of a broader, systemic problem caused by the Court's previous rulings: an unjustifiable hostility to religious expression in public squares across America. And just as there is bipartisan agreement on the constitutionality of the Pledge of Allegiance, so should there be bipartisan agreement that government should never be hostile to expressions of faith.

Accordingly, our hearing today is entitled "Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square." Our witnesses will examine issues of government discrimination against religious expression generally – including both discrimination against religious versus non-religious expression in government speech, as well as discrimination against purely private expressions of faith.

THE FIRST AMENDMENT HAS BEEN BADLY MISUNDERSTOOD

It's difficult to think of a provision of the Constitution that has been as badly misunderstood and misapplied as the First Amendment in this respect – or with worse consequences for our coarsened culture and discourse.

The First Amendment contains two important provisions with respect to religious liberty. It protects the "free exercise" of religion against government interference or intrusion. And it also provides that Congress shall make no law "respecting an establishment of religion."

The Founders included the Establishment Clause, because they wanted to forbid government from taking any action either to establish an official state church, or to favor a particular religious denomination in any other way.

Notably, nothing in these provisions requires government to be hostile to religion overall. The Constitution nowhere requires government to expel expressions of faith from the public square. Nor does the Establishment Clause forbid government from acknowledging, indeed celebrating, the important role that faith has historically played in the lives of the American people – dating back to the Founders themselves.

This week, the nation mourns the passing of a great man, President Ronald Reagan. I think he spoke for the American people when he said in 1983, and I quote: "When our Founding Fathers passed the First Amendment, they sought to protect churches from government interference. They never intended to construct a wall of hostility between government and the concept of religious belief itself."

REFERENCES TO FAITH PERMEATE OUR GOVERNMENT

After all, references to faith permeate our nation's history. References to faith can be found across our nation's most important institutions of government, in our fundamental legal documents, and on our cherished cultural treasures. Our currency is emblazoned with the phrase "In God We Trust." The public buildings of all three branches of government – including the U.S. Supreme Court – are decorated with numerous references to God. The Declaration of Independence acknowledges the Founders' "firm reliance on the protection of Divine Providence." It talks about "nature's God" and our "Creator," while the Constitution refers to "our Lord."

An act of Congress authorized President Washington to issue the nation's first Thanksgiving Proclamation. Moreover, that Proclamation specifically referenced the "duty of all Nations to acknowledge the Providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor." And on the very day that Congress proposed the First Amendment, it also approved the Northwest Ordinance, which explicitly directed to U.S. territorial governments that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

So there is ample precedent and strong tradition to support government speech that acknowledges, accommodates, and indeed celebrates the importance of faith in the lives of the American people.

Moreover, the First Amendment specifically protects private religious expression in the public square, by guaranteeing both the free exercise of religion and freedom of speech against government interference. As Justice Scalia has aptly written, "a priest has as much liberty to proselytize as a patriot" – a principle that holds in the public square the same as on private property.

JUDICIAL HOSTILITY TO RELIGIOUS EXPRESSION

Despite these clear constitutional commands, however, activist courts, led by the U.S. Supreme Court, have demonstrated a clear and unmistakable – if inconsistent and unstable – hostility towards religious expression in the public square.

In a case I argued before the Supreme Court as attorney general of Texas, the Court held – and I quote – that a high school's "policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." [*Santa Fe Indep. Sch. Dist. v. Doe* (2000).] Moreover, just this year, the Court upheld overt religious discrimination in the state of Washington, when it allowed the state to provide college scholarships even though they exclude all theology majors from the program. [*Locke v. Davey*, (2004).]

The hostility towards religion is as inconsistent as it is unjustified. In the Fifth Circuit, which governs my home state of Texas, students may initiate and lead non-sectarian prayer at graduation ceremonies – but not before football games. [*Doe v. Santa Fe Independent School Dist.* (5th Cir. 1999).] As Chief Justice Rehnquist famously noted in 1985, "a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. . . . A science book is permissible, a science kit is not. . . . A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip." [*Wallace v. Jaffree* (1985).]

Given this troubling and incoherent jurisprudence, it is no surprise that local governments have far too often demonstrated similar hostility to religious expression as a result. Whether out of ideological motivation, ignorance of the law, or simple fear of litigation, local governments across the nation have repeatedly attempted to banish faith from the public square.

HOSTILITY TO RELIGIOUS EXPRESSION IN PRACTICE

Today, we will hear the personal stories of citizens who have experienced government hostility to religious expression first hand.

In one case, a public school in Muskogee, Oklahoma ordered Nashala Hearn, a 12 year-old Muslim student, not to wear her hijab, or headscarf, and suspended her when she refused to comply, in accordance with the dictates of her faith. It was not until the current Justice Department – which has taken special and admirable steps to champion religious freedom as a basic civil right – intervened on Nashala's behalf, that the school finally backed down and settled the case out of court just last month.

In the small town of Balch Springs, in my home state of Texas, a city-owned senior center barred a group of senior citizens from privately engaging in prayer and singing religious hymns. It took the involvement of public interest lawyers from the Liberty Legal Institute and, once again, the support of the Justice Department for the city to back down.

The examples are countless. Children across America are being barred from sharing candy canes with classmates. Teachers are being reprimanded for circulating the President's Proclamation of a Day of National Prayer through their school e-mail accounts. Schools are specifically targeting religious groups and excluding them from their campuses.

The situation has become so extreme that even patriotic and other nonreligious references to faith have been attacked. It is simply patriotic to recite the Pledge of Allegiance, yet the Ninth Circuit believes it is unconstitutional in public schools. The Los Angeles County seal is under attack by the ACLU because it includes a depiction of a cross – a cross that simply reflects "the historical importance of the Catholic missions" in California.

This pervasive hostility to faith is wrong, and it is without constitutional basis.

BIPARTISANSHIP

I hope that today's hearing will accomplish two things. First, we must reaffirm our bipartisan commitment to religious freedom and liberty in the public square. And second, we must recognize that unfortunate and unjustified hostility to religious expression is pervasive, and it must be stopped.

The restoration of religious liberty and celebration envisioned by the Founders should be a bipartisan effort. The judicial attack on the Pledge of Allegiance has been unanimously condemned by the United States Senate. And both the Clinton and Bush Administrations have issued Department of Education guidelines forbidding discrimination against religion by public schools, consistent with a Congressional mandate in the No Child Left Behind Act.

I began my remarks by quoting President Ronald Reagan. I would like to close with words from President Clinton, who stated in 1995, and I quote:

"Americans feel that instead of celebrating their love for God in public, they're being forced to hide their faith behind closed doors. That's wrong. Americans should never have to hide their faith. But some Americans have been denied the right to express their religion and that has to stop. That has happened and it has to stop."

I agree. Americans should never have to hide their faith. They have the constitutional right to exercise their faith openly – not just at home, but in the public square as well.

Testimony
*United States Senate Committee on the Judiciary*
**Beyond the Pledge of Allegiance: Hostility to Religious Experssion in the Public Square**
June 8, 2004

**The Honorable Chet Edwards**
United States Representative , Texas

Mr. Chairman:

One cannot fully discuss the issue of religion in the public square without first addressing this fundamental question: what is the proper relationship between church and state?

Mr. Madison and Mr. Jefferson thought the question so important they debated it for a decade in the Virginia legislature.

Our founding fathers placed so much importance on the question of church and state that they chose to put their answer in the first sixteen words of the Bill of Rights: "Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof."

In his letter to the Danbury Baptists of Connecticut in 1802, Mr. Jefferson said the intent of this constitutional principle was to build "a wall of separation between church and state."

Perhaps America's greatest contribution to the world from our experiment in democracy has been the religious freedom and tolerance that have resulted from the principle of church-state separation. In fact, I would challenge anyone to show me any nation where direct government involvement in religion has resulted in more religious freedom or tolerance than we have here in the United States. As a person of faith, a lifelong Methodist and the son-in-law of a Baptist minister, I thank God that we live in a nation where our founding fathers had the wisdom to put religion on a pedestal far above the reach of politicians.
Our founding fathers understood that the lesson of human history is that three things happen when government and politicians get involved in religion: First, the rights of religious minorities are limited. Second, politicians cannot withstand the temptation to use religion as a means to their own political ends. And, third, government funding of churches, synagogues and mosques ultimately harms houses of worship by undermining their independence and by creating a public impression that they are just another bureaucratic arm of the state.

Perhaps that lesson of history is why I would warn religious leaders and people of faith to be cautious when any politician says, "I am with the government and I am here to help you."

Mr. Chairman, as this Subcommittee and House Committees move forward on the question of the proper role between church and state, I would respectfully make three suggestions.

1. Since the issue of religious freedom is so important to all Americans, and since our founding fathers debated this question for years and then chose to make church-state separation the first principle enunciated in the Bill of Rights, this Subcommittee should hold a number of in-depth hearings on this issue, inviting legal, religious and academic scholars from differing viewpoints. To do anything less would be a disservice to the 1st Amendment and the religious freedom and tolerance it has protected so magnificently for over two centuries.

2. This Committee's public notice said it will examine "government discrimination against religious

expression..." In doing so, I hope you will have hearings on the implications of denying American citizens tax-funded jobs based solely on their religious faith. While I support many parts of the Administration's faith-based initiatives, I strongly disagree with the provisions that make it legal for hiring and firing decisions for public jobs to be based solely on one's religious beliefs. No American citizen should have to pass someone else's private religious test to qualify for a tax-funded job. In my opinion, the federal government should not be in the business of subsidizing religious discrimination with tax dollars. That type of serious religious discrimination deserves this Committee's attention.

Also, on the issue of discrimination, as a Christian I revere the Ten Commandments and try to live by them every day, but, I hope you will address these questions: Do we really want politicians and public officials deciding which specific religious doctrine or beliefs should and should not be prominently placed in public courthouses and schoolhouses? It's a Pandora's Box. Either all groups, including religious supporters of Islamic militants, Wiccans, the Church of the Creator and others will be allowed to display their religious beliefs on public buildings, or we can follow the Chinese government's model where politicians have the power to decide which religious doctrine receives official government approval. Which will it be?

3. Let's debate this vital and complicated issue of church-state separation with respect for those with differing viewpoints. I have great respect for Mr. Towey of the White House Office of Faith-Based Initiatives, but I believe he went too far last week when he defined the church-state debate as a "cultural war." Groups such as the Baptist Joint Committee, Methodists and the American Jewish Committee are strong defenders of church-state separation. Are they guilty of fighting a cultural war against religious expression in the public place? I hardly think so. Even if you disagree with their views, we should respect the fact that these people of faith believe they are fighting to protect religious freedom from government entanglement. I believe Mr. Towey owes many people of faith an apology for suggesting they are involved in a cultural war, in effect, a religious war. As we fight Osama bin Laden and the war on terrorism, let's leave the lexicon of war to our Army generals in Iraq and Afghanistan and keep it out of honest debates on religious freedom here at home. Our nation doesn't deserve the kind of divisiveness that could be caused by putting religious debates in the context of being a war, cultural, religious or otherwise.

This Committee, in announcing and naming this hearing, did not go so far as to describe this debate as war. However, it used loaded phrases such as "hostility to religion" and "hostile to religious expression."

This debate is not about who is on God's side and who is not. Religious critics were dead wrong when they attacked Mr. Madison and Mr. Jefferson two centuries ago and said they were anti-religion because of their belief in church-state separation. Let's not repeat that same mistake today.

In conclusion, the Bill of Rights has never been amended in over two centuries. Especially when it comes to the first freedom—religious freedom—we should move carefully and thoughtfully before we tamper with a system of religious freedom and tolerance that is the model for the world.

It would be ironic to have Americans preaching the principle of church-state separation in Iraq if, here at home, we don't practice what we preach. The American people and the issue of how to best protect religious freedom deserve a thoughtful, reasoned debate.

Statement
*United States Senate Committee on the Judiciary*
**Beyond the Pledge of Allegiance: Hostility to Religious Experssion in the Public Square**
June 8, 2004

**The Honorable Russ Feingold**
United States Senator , Wisconsin

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Mr. Chairman, a guarantee of religious freedom was fundamental to our nation's founding. The Pilgrims and other settlers braved crossing the Atlantic Ocean because they were fleeing religious persecution and wanted to live where they could exercise their religious beliefs freely. And so, it is not surprising that a guarantee of the free exercise of religion without government intrusion would be contained in the very first line of the first of 10 rights guaranteed to every Americans in the Bill of Rights.

The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." In other words, the First Amendment contains two important guarantees of religious freedom -- the Free Exercise Clause and the Establishment Clause. Americans have the right to exercise their religion, and Americans of any faith, or no faith at all, have the right to be free from government establishment of religion in their lives. Together, the Free Exercise Clause and the Establishment Clause have allowed religion in our nation to flourish. In addition, as President Bush has noted, "Preserving religious freedom has helped America avoid the wars of religion that have plagued so many cultures throughout history, with deadly consequences."

So, Mr. Chairman, with all due respect, I disagree with the title of this hearing -- "hostility to religious expression in the public square." I do not think that there is widespread hostility. There may be confusion. There may be some in our country who would like to censor all public expressions of religious faith. There may be others who want to read the Free Exercise Clause in isolation and ignore the Establishment Clause, even to the point of having a state-sponsored religion.

But the fact is that the First Amendment in its entirety has served our nation well and has allowed religious expression to thrive, not be stifled. Americans are a deeply religious people and yet we have no official state religion. Those two facts taken together succinctly express the genius of the framers in the area of religious freedom.

In recent years, there has been a lot of confusion about what the religion clauses of the First Amendment require and forbid. I hope that this hearing will clarify those areas of confusion, from the Pledge of Allegiance, to religious garb in schools, to expression of religious faith by private citizens in public buildings or at public events, to government-sponsored sectarian prayers at such events.

Ours is a nation built on diversity and religious pluralism. The legacy of religious liberty in our nation is unparalleled in human history. And we in the Congress have a special duty to protect and nurture that legacy.

I supported the Religious Freedom Restoration Act in 1993. I thought the Supreme Court made a mistake in the Smith decision in 1990 by reducing the protection of religious expression from governmental intrusion. I was disappointed when the Court later struck down the Religious Freedom Restoration Act as an inappropriate exercise of congressional power. In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act and may need to enact further legislation to protect the free exercise of religion. But I hope that it does so in a way that respects the Establishment

Clause as well.

Americans were acutely reminded of our nation's tradition of religious freedom earlier this year when France banned religious articles and symbols in state schools. This meant that Christian, Jewish, Muslim, and Sikh students and students of other faiths would be denied the right to practice their faith once they entered the schoolhouse door. Thankfully, our nation has never seen a similar effort to stifle individual, voluntary religious expression by students in our public schools, although there have been instances where government officials misunderstood the law. As we will hear from Nashala Hearn this morning, she experienced one such unfortunate episode. But I am very pleased that her case reached the proper result – a result that re-affirms religious freedom.

Like many Americans, Mr. Chairman, I disapproved of the Court of Appeals' decision in Newdow v. U.S. Congress, the Pledge of Allegiance case. I joined with my Senate colleagues when we unanimously expressed our view that the Pledge is constitutional. The phrase "under God" in the Pledge is not, and should not be construed as, government establishment of religion. The Supreme Court will issue its decision in the Newdow case any day now, and I, like most Americans, am hopeful that the Supreme Court will uphold the Pledge.

While I do think the lower court went too far in finding a violation of the Establishment Clause, we should nevertheless recognize that the Establishment Clause has an important role in protecting all Americans and their right to exercise their religion, or no religion at all. Today, we will hear from Steven Rosenauer, whose experience, I believe, will illustrate the need to be mindful of the importance of the Establishment Clause as we consider the issue of religious expression at public events.

I am also very pleased that we have Reverend Brent Walker and Professor Melissa Rogers here this afternoon. Reverend Walker is with the Baptist Joint Committee on Public Affairs and is an ordained Baptist Minister. He understands the legal, practical, and theological dimensions of religious freedom. Professor Rogers was formerly with the Pew Forum on Religion and Public Life and is currently a professor at Wake Forest University's Divinity School. She will give us insight into the legal and policy issues involved in this debate, which is as old as our republic itself. Finally, I want to welcome our Senate colleagues on the first panel and Representative Chet Edwards of Texas, one of the most passionate defenders of religious liberty in the Congress.

In sum, Mr. Chairman, I believe that the First Amendment provides parameters that have been absolutely critical in protecting religious freedom and allowing Americans to thrive in and practice whatever religion they choose. These are parameters that have served our nation well since its founding. Despite the title of this hearing, I believe that the First Amendment is alive and well in our country, as is religion.

Thank you, Mr. Chairman. I look forward to hearing from our witnesses.

TESTIMONY OF
PROF. RICHARD W. GARNETT

THE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS & PROPERTY RIGHTS

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

"Beyond the Pledge of Allegiance:
Hostility to Religious Expression in the Public Square"

Tuesday, June 8, 2004
Washington, D.C.

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MR. CHAIRMAN, I appreciate the opportunity to share with you some thoughts about the place of religion in civil society, and – more particularly – about the protections that our Constitution guarantees to religious expression and activity in the public square.

These are issues of great importance to me as a citizen, as a scholar, and as a teacher. By way of background: I teach and write about the First Amendment at the Notre Dame Law School.[1] At Notre Dame, we invite and – we hope – inspire young lawyers to bring their values and religious faith to their studies, and then to carry them into their lives in the law. In our view, we cannot expect young lawyers to think deeply and well about law, justice, and the common good if we tell them to privatize their ideals, or to radically separate their fundamental moral commitments from their law practices. Therefore, we encourage our students to approach both their vocations in the law and their roles as citizens as *whole persons*. We challenge them to *integrate* their work, their

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[1] *See, e.g., Assimilation, Toleration, and the State's Interest in Religious Doctrine*, ___ U.C.L.A. L. REV. ___ (2004) (forthcoming); *American Conversations With(in) Catholicism*, ___ MICH. L. REV. ___ (2004) (forthcoming) (reviewing JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY (2003)); *The Theology of the Blaine Amendments*, 2 FIRST. AMD. L. REV. 45 (2003); *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J. ETHICS, L. & PUB. POL'Y 541 (2003); *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281 (2002); *Sectarian Reflections on Lawyers' Ethics and Death-Row Volunteers*, 77 NOTRE DAME L. REV. 795 (2002); *Common Schools and the Common Good: Reflections on the School-Choice Debate*, 75 ST. JOHN'S LAW REV. 219 (2001); *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001); Brown's *Promise, Blaine's Legacy*, 17 CONST. COMM. 651 (2000) (reviewing JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999)); *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000); *Francis Bacon Takes On The Ghouls: The "First Principles" of Religious Freedom*, 3 GREEN BAG 2D 421 (2000) (reviewing JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2000)); *School Choice, The First Amendment, and Justice*, 4 TEX. REV. L. & POL. 301 (2000) (with Nicole Stelle Garnett).

beliefs, their values, and their activism. We urge them to avoid the temptation to "check their faith at the door" of their professional and public lives.

With respect to the matter before us today – *i.e.*, discrimination by government against religiously motivated expression and action – I begin with a fundamental, bedrock premise: As President Clinton put it, nearly ten years ago, "religious freedom is literally our first freedom."[2] In other words, the freedom of religion was *central* to our Founders' vision for America.[3] The Framers did not always agree about *precisely* what the "freedom of religion" meant, but they knew that it mattered.

We should remember, therefore, that the protections afforded to religious freedom in our constitutional text and tradition are neither accidents nor anomalies. They are not, as one scholar once claimed, an "aberration in a secular state."[4] Quite the contrary: In our traditions and laws, religious freedom is cherished as a basic human right and a non-negotiable aspect of human dignity. Our Constitution does not regard religious faith with grudging suspicion, or as a bizarre quirk or quaint relic. Rather, as my former colleague, Dean John Garvey, once observed, our laws protect the freedom of religion because "religion is important" and because, put simply, "the law thinks religion is a good thing."[5]

Now, from all this, it follows that our laws and constitutional doctrines should regard governmental restrictions upon religious expression – and *not* religious expression itself – with sober skepticism. In a free society like ours, the "[t]he calculus of religious liberty . . . is determined" not by the extent to which governments manage to confine religious expression to the privacy of homes and churches, but instead "by the measure of religiously motivated thought and action that is insulated from public authority."[6]

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Now, MR. CHAIRMAN, as I am sure you are aware, the law books, newspapers, weblogs, and talk shows are rich with stories of public officials who have neglected, or lost sight of, these fundamental premises of the American experiment. They have turned things upside down by treating citizens' public religious expression with suspicion, and even hostility, rather than with evenhandedness and respect.

I will mention here just a few examples, because I know you have heard and will hear about many more: Not long ago, Robert and Mildred Tong sought to participate in a

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[2] President William Jefferson Clinton, *Religious Liberty in America* (July 12, 1995). *See also, e.g.*, THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000).

[3] *See generally, e.g.*, JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000); JOHN T. NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (1998).

[4] Suzanna Sherry, *Enlightening the Religion Clauses*, 7. J. CONTEMP. LEGAL ISSUES 473, 477 (1996).

[5] JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42, 57 (1996).

[6] JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 165 (1999).

local "buy a brick" program, designed to raise money for a new playground at their local park. They were told, however, by Chicago Park District officials that the message they submitted for their family brick – which included the words, "Jesus is the Cornerstone" – was *too religious* to be included.[7]

Another example: When several residents of Oak Park, Illinois, sought permission to use the Village Hall for a ceremony connected to the National Day of Prayer, their application was denied, even though the Hall was generally available to citizens and community groups for a wide range of activities, on the ground that the proposed ceremony was "religious," not a "civic program or activity," and would not "benefit the public as a whole."[8]

Finally: The School District in Scottsdale, Arizona had a general, community-service policy of permitting non-profit groups to distribute literature promoting events and activities of interest to students, such as summer camps, art classes, sports leagues, and artistic performances. However, the District refused to distribute the brochure for one particular summer camp, citing the fact that the camp offered two courses on "Bible Heroes" and "Bible Tales."[9]

Now, MR. CHAIRMAN, the "good news" is that in these particular cases – and also in many others – courts of law eventually vindicated the basic constitutional rule that governments may not discriminate against "religious ideas [and] religious people."[10] What's more, although some government officials continue to misunderstand their obligations and authority with respect to private persons' religious expression, the United State Supreme Court continues to re-affirmed that the Constitution neither requires nor permits state actors to single out religious expression and activities for unfavorable or unequal treatment.[11] As Justice Scalia once put it, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[12]

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[7] Tong v. Chicago Park District, ___ F. Supp. 2d ___, 2004 WL 943446 (D. Ill., April 29, 2004).
[8] DeBoer v. Village of Oak Park, 267 F.3d 558 (7th Cir. 2001).
[9] Hills v. Scottsdale Unified School District, 329 F.3d 1044 (9th Cir. 2003).
[10] Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment). *See also, e.g.,* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (noting the bedrock principle of First Amendment jurisprudence that the government "may not . . . impose special disabilities on the basis of religious views or religious status"); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) (insisting that government "may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits").
[11] *See, e.g.,* Good News Bible Club v. Milford Central School, 533 U.S. 98 (2001); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993). *See generally, e.g.,* Eugene Volokh, *Equal Treatment Is Not Establishment,* 13 NOTRE DAME J. L. ETHICS & PUB. POL'Y 341 (1999); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Litigation*, 61 NOTRE DAME L. REV. 311 (1986).
[12] *Capitol Square,* 515 U.S. at 760 ("[G]overnment suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.").

And so, a question for this Committee is, why does state-sponsored discrimination against religious expression continue? What's the problem? To be clear: I am confident that the public officials involved in these cases do not harbor ugly prejudices or deep hostility toward religious believers. Nor do I believe that they are willfully neglecting their obligations under the Constitution. Instead, I am convinced that the officials in these cases – and also, unfortunately, too many well-meaning Americans today – fail to understand and appreciate the text, history, and purpose of the Religion Clause of the First Amendment, in several important and related ways.

*First,* many public officials and citizens misunderstand the meaning of the phrase, "separation of church and state," and the place of this idea in our constitutional tradition. To be sure – as thinkers from St. Augustine to Pope Gregory VII to Roger Williams have taught us[13] – the "separation of church and state," properly understood, is an important component of religious freedom. That is, the *institutional and jurisdictional separation* of religious and political authority, the independence of religious communities from government oversight and control, respect for the freedom of individual conscience, government neutrality with respect to different religious traditions, and a strict rule against formal religious tests for public office – all these "separationist" features of our constitutional order have helped religious faith to thrive in America. Properly understood, the separation of church and state is not an anti-religious ideology, but a "means, a technique, [and] a policy to implement the principle of religious freedom."[14]

However, too many have confused Thomas Jefferson's "figure of speech"[15] about a "wall of separation between church and State" with a novel and unsound rule that would obligate public officials to scrub clean the public square of all "sectarian" residue. Professor Kathleen Sullivan, for example, has argued forcefully and prominently that the First Amendment's Establishment Clause was designed not simply to end official sponsorship of churches but also to *affirmatively establish* a secular "civil order for the resolution of disputes."[16] This view of church-state separation is seriously mistaken. It is untrue to the vision of our Founders and to the text of our Constitution.[17] As John Courtney Murray lamented more than 50 years ago, arguments like this stand the First Amendment "on its head. And in that position it cannot but gurgle nonsense."[18]

In fact, our Constitution separates "church" and "state" not to confine religious belief or silence religious expression, but to *curb the ambitions and reach of governments*. In our

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[13] *See generally, e.g.,* John Witte, Jr., Book Review, *That Serpentine Wall of Separation,* 101 MICH. L. REV. 1869 (2003).
[14] John Courtney Murray, *Law or Prepossessions?,* 14 J. L. CONTEMP. PROBS. 23, 32 (1949).
[15] *See* McCollum v. Board of Education, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech.").
[16] Kathleen Sullivan, *Religion and Liberal Democracy,* 59 U. CHIC. L. REV. 195, 197 (1992).
[17] *See generally, e.g.,* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2000); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); GERALD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987). *See also, e.g.,* Wallace v. Jaffree, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting).
[18] John Courtney Murray, *Law or Prepossessions?,* 14 J. L. CONTEMP. PROBS. 23, 23 (1949).

laws, "Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are . . . limits on its authority and leaves the churches free to perform their work in society."[19]

*Second,* and relatedly, too many of us have forgotten that the First Amendment limits *government* conduct only. It has *nothing* to say about private action, other than to confirm that religious expression, exercise, and worship are worth protecting.[20] The First Amendment's Establishment Clause is not a *sword*, driving private religious expression from the marketplace of ideas; rather, the Clause constrains government, precisely to serve as a *shield*, and to protect religiously motivated speech and action. Judge McConnell captured the idea succinctly: "If a group of people get together and form a church, that is the free exercise of religion. If the government forms a church, that is an establishment of religion. One is protected; one is forbidden."[21]

*Third,* nothing in our political morality or constitutional traditions mandates or implies a duty of self-censorship by religious believers. Nothing in the First Amendment suggests that religious expression is somehow unwelcome or out of place in civil society and public debate. And yet, many in America appear to share the view – expressed bluntly by one of our leading public intellectuals – that it is in "bad taste to bring religion into discussions of public policy."[22] On this view, as Stephen Carter memorably put it, religion is "like building model airplanes, just another hobby: something quiet, something trivial–not really a fit activity for intelligent . . . adults."[23]

Now, as you know, MR. CHAIRMAN, scholars are and have long been wrestling with the question of the appropriate place for religiously grounded arguments in public life.

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[19] William Clancy, *Religion as a Source of Tension, in* RELIGION AND THE FREE SOCIETY 27-28 (1958). *Cf., e.g.,* Thomas C. Berg, *The Pledge of Allegiance and the Limited State,* 8 TEX. REV. L. & POL. 41, 76 (2003) (suggesting, among other things, that "Under God" in the Pledge "is a means for the state to declare that it is a limited institution that is subject to, and does not interfere with, higher commitments and norms"); McConnell, *Why Is Religious Liberty the "First Freedom," supra,* at 1244 ("The division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas.").

[20] *See, e.g., Capitol Square,* 515 U.S. at 767 ("By its terms [the Establishment] Clause applies only to the words and acts of *government.* It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech[.]"); Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

[21] Michael W. McConnell, *"God Is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age,* 1993 BYU L. REV. 163, 184.

[22] Richard Rorty, *Religion as Conversation-Stopper,* 3 COMMON KNOWLEDGE 1, 2 (1994). *See also* William Marshall, *The Other Side of Religion,* 44 HASTINGS LAW JOURNAL 843, 844 (1993) (Religion and religious conviction, on the other hand, "are purely private matters that have no role or place" in the political arena).

[23] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 22(1993).

This is a rich and important conversation, but – in my view – the bottom line is clear: Our Constitution does not demand a Naked Public Square,[24] nor does it tolerate efforts by government to create one. The Constitution imposes no "don't ask, don't tell" rule on religious believers presumptuous enough to venture into public life,[25] and the Establishment Clause imposes no special obligation on devout religious believers to "sterili[ze]" their speech before entering the public forum.[26] Active and engaged participation by the faithful is perfectly consistent with the institutional separation of church and state that the Constitution is understood to require.

What's more, and going beyond constitutional law for a moment, the political morality of liberal democracy, rightly understood, does not require self-censorship on the part of persons who are believers *and* citizens. In fact, it would seem more than a little bit *illiberal*, to assert the peculiar unsuitability for public discourse of one source–*i.e.*, religious faith–of morality, "values," and commitment.[27] To force religious believers to concede, as the price of admission to the political community, that "religious reasons are not good reasons for political action," is, as my colleague Paul Weithman has observed, to deny religious believers "full membership" in that community.[28]

True, some courts and officials have at times seemed more worried about the "divisiveness"[29] thought to attend public manifestations of religious commitment than about the threats posed to authentic religious freedom and pluralism by their own over-

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[24] *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1996).

[25] Jean Bethke Elshtain, *How Should We Talk?*, 49 Case WESTERN RES. L. REV. 741, 744 (1999) ("To tell religious believers to keep quiet, else they interfere with my rights simply by speaking out is an intolerant idea. It is, in effect, to tell folks that they can not really believe what they believe or be who they are: Don't ask. Don't tell.").

[26] *Good News Club v. Milford Central School*, 533 U.S. 98, 124 (2001) (Scalia, J., concurring). *See also, e.g.*, Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WILLIAM AND MARY LAW REVIEW 663 (2001).

[27] *See, e.g.*, Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 654 n. 56 ("Some views–such as advocacy of slavery or cruelty–may be treated by a liberal society as beyond the pale. But to treat religious views, which have been, and are, entertained by a large majority of the people, including many people of eminent reasonableness and good sense, as within this category, is surely illiberal."); Nicholas Wolterstorff, *Audi on Religion, Politics, and Liberal Democracy*, *in* ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE 147 (1997) ("[T]he ethic of the citizen in a liberal democracy imposes no restrictions on the reasons people offer in their discussion of political issues in the public square . . . . If the position adopted, and the manner in which it is acted upon, are compatible with the concept of liberal democracy, and if the discussion concerning the issue is conducted with civility, then citizens are free to offer and act on whatever reasons they find compelling."); Michael J. Sandel, *Political Liberalism*, 107 HARVARD LAW REVIEW 1765, 1772-73 (1994) ("Why must we 'bracket' . . . our moral and religious convictions, our conceptions of the good life? Why should we not base the principles of justice that govern the basic structure of society on our best understanding of the highest human ends?") (reviewing JOHN RAWLS, POLITICAL LIBERALISM (1993)).

[28] Paul Weithman, *Religious Reasons and the Duties of Membership*, 35 WAKE FOREST L. REV. 511, 532 (2001).

[29] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

reactions.[30] And, as a result, their pronouncements have, in Chief Justice Rehnquist's words, at times seemed to "bristle[] with hostility to all things religious in public life."[31] The recent decision by Los Angeles County, bowing to the threat of a meritless law suit, to remove a tiny gold cross from the County Seal is a reminder that such regrettable over-reactions continue. We should remember, as Professor Jean Bethke Elshtain has warned, that "if we push too far the notion that, in order to be acceptable public fare, all religious claims . . . must be secularized, we wind up de-pluralizing our polity and endangering our democracy."[32]

*Finally,* many Americans misunderstand the significance of the Supreme Court's observation that, under our Constitution, "religion must be a private matter for the individual, the family, and the institutions of private choice[.]"[33] Clearly, few would disagree with the claim that "religion is private," if the claim is taken to refer to institutional disestablishment or an entirely appropriate respect on government's part for individual freedom of conscience and the autonomy of religious institutions. But this claim should *not* be taken to mean that religious expression and witness has no place in civil society or that religious faith does not speak to questions of public policy and the common good.

William James once quipped, "in this age of toleration, [no one] will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it[.]"[34] Sometimes, though, religious people are called *precisely* to "make a public nuisance" – and also to engage respectfully their fellow citizens in dialogue about how we should live and live together. Nothing in our constitutional text and traditions implies that religious citizens should not speak and act as though their faith had consequences for state and society. As Justice Thomas has insisted, it would be a "most bizarre" reading of the First Amendment that would "reserve special hostility for those who take their religion seriously, [and] who think that their religion should affect the whole of their lives."[35]

The Constitution protects our right to keep our faith private. However, it does not *require* us to privatize our faith before entering into the public square, or taking up the responsibilities of citizenship. Indeed, it would be highly – and unconstitutionally – presumptuous for government to instruct religious believers and communities as to the limited scope of religion's concerns.[36]

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[30] *Cf. Good News Club,* 533 U.S. at 118 ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.").
[31] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting).
[32] Jean Bethke Elshtain, *State-Imposed Secularism as a Potential Pitfall of Liberal Democracy* (Prague 2000).
[33] *Lemon,* 403 U.S. at 625.
[34] WILLIAM JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY xi (1897) (Dover ed. 1956).
[35] Mitchell v. Helms, 530 U.S. 793, 827-28 (2000) (plurality op.).
[36] *See generally, e.g.,* Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Gerard V. Bradley, *Dogmatomachy: A "Privatization" Theory of the Religion Clause Cases*, ST. LOUIS U. L. J. 275 (1986).

Here, it is worth bringing up a recent decision by the California Supreme Court, which recently ratified an effort by that State's legislature to confine, and to re-define, the religious mission of the Catholic Church.[37] In the *Catholic Charities* case, the court upheld a provision that denies a "religious employer" exemption from the State's requirement that employers include contraception coverage in their prescription-drug-benefit programs to Catholic organizations that engage in activities other than worship and religious instruction or that hire and serve people other than co-religionists. Put simply, California has imposed on religious communities like the Catholic Church an ideology of radically privatized religion. As Justice Brown reminded her colleagues, though, many churches have "never envisioned a sharp divide between the Church and the world, the spiritual and the temporal, or religion and politics. For the Church, the internal spiritual life of its members and institutions must always move outward as a sign and instrument for the transformation of the larger society."[38]

In my judgment, sweeping mandates and narrow exemptions, like the ones at issue in the *Catholic Charities* case, pose grave threats to church autonomy and religious freedom. They also rest – like the arguments of those who contend that religious expression is inappropriate in public settings, or about public-policy issues – on a misunderstanding of "private religion."

In the end, as Professor John Witte writes, "public religion must be as free as private religion. Not because the religious groups in these cases are really nonreligious. Not because their public activities are really nonsectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free *just because they are religious*."[39]

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Thank you again, MR. CHAIRMAN, for your interest in, and attention to, these important matters.

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[37] Catholic Charities of Sacramento, Inc. v. Superior Court, 10 Cal. Rptr. 3d 283 (2004).

[38] *Id.* at 573 (Brown, J., dissenting) (citing *K. Brady, Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILLANOVA L. REV. 156, 157 (2004)).

[39] WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, *supra,* at 237.

Statement
*United States Senate Committee on the Judiciary*
**Beyond the Pledge of Allegiance: Hostility to Religious Experssion in the Public Square**
**June 8, 2004**

**The Honorable Orrin Hatch**
United States Senator , Utah

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"Beyond the Pledge of Allegiance:

Hostility to Religious Expression in the Public Square"

Thank you very much, Senator Cornyn, for holding this important hearing. As many of our panelists today will attest, our legal culture is increasingly hostile to public expressions of religious faith, and this hostility jeopardizes the free exercise rights of religious citizens –religious minorities in particular. In the zeal to erect an artificial barrier between religion and public life, the rights of religious persons to practice their faith have been forgotten. This is a development that demands our attention.

Left to their own devices, I have no doubt that the American people would take a pragmatic approach to balancing a need for separation between church and state with the personal right to free exercise. Unfortunately, judicial activists are attempting to force all remnants of religion from the public square. And this hostility toward religion has had the unintended consequence of undermining the commitment to toleration and respect for fellow citizens on which this country depends.

The judiciary now interprets the First Amendment's establishment clause so broadly that it is driving nearly every expression of religious belief from our public institutions, even such harmless expressions as non-denominational prayer before a high school football game or graduation ceremony. Wittingly or unwittingly, our courts are creating what the Reverend Richard John Neuhaus calls a "naked public square," a secular community devoid of any religious commitments.

But unlike the French Revolution, which succeeded in creating a purely secular state, the doctrine of individual rights that inspired the American Revolution was preached from our fledgling nation's pulpits. When the French government recently prohibited young Muslim girls from wearing their traditional head scarves in public schools, they were merely reaffirming their constitutional traditions. But the American Revolution was not hostile to religious faith, and when a school district in Oklahoma penalizes the same customary garb, it compromises our constitutional traditions by punishing a vulnerable religious minority.

Ours is a nation born of religious dissenters and minorities. When we fail to accommodate the religious exercises of Caribbean faiths, Native Americans, or any other religious minority, we undermine the Constitution. Massachusetts, Pennsylvania, Connecticut, even my own state of Utah—all were born in an effort to harbor persons of diverse faiths. When Catholics succumbed to famine in Ireland, they came to the United States, and their religious beliefs were accommodated. When Jews fled Eastern Europe and Russia, they came to America and were welcomed as fellow citizens.

Despite this history, activist courts have done their best for this past generation to drive any vestiges of religious belief from public life. It is sad, but unsurprising then that citizens and legislators follow their lead and conclude that even minor expressions of religious faith are unacceptable.

As a committee charged with judicial oversight, it is our obligation to stop this development. It is

fitting this week to recall the words of our friend and late President, Ronald Reagan, who recognized the religious underpinning of this country's founders, and the continuing importance of those roots today. He said:

"Americans are a free people living under the law, with faith in our Maker and in our future. I've said before that the most sublime picture in American history is of George Washington on his knees in the snow at Valley Forge. That image personifies a people who know that it's not enough to depend on our own courage and goodness; we must also seek help from God, our Father and Preserver."

President Reagan understood what George Washington and the other Founders already understood. Religion is not hostile to free government. In fact, religious commitments to personal equality and human dignity help to perpetuate free government.

In our hearing today, hopefully we will begin to restore some of that wisdom. I thank Senator Cornyn again for chairing this essential hearing, and I look forward to working on this issue with you.

Thank you.

**Testimony of Nashala Hearn**

**The Subcommittee on the Constitution, Civil Rights and Property Rights**
**U.S. Senator John Cornyn, Chairman**

"Beyond the Pledge of Allegiance:
Hostility to Religious Expression in the Public Square"

Tuesday, June 8, 2004
Washington, D.C.

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Thank you Senator Cornyn. It is an honor to be here. And thank you Senator Feingold, too.

My name is Nashala Hearn. I am 12 years old and I live in Muskogee, Oklahoma with my father – who is here with me today – and my mother, and my brother and my sister. I attend the Benjamin Franklin Science Academy, which is a public middle school in my home town.

On October 1st, 2003 I was suspended for 3 days from the Muskogee Public Schools for wearing my hijab – which is a headscarf required by religion – Islam.

I didn't know it was going to be a problem because on August 18 2003 – my first day of school last year – I explained to my homeroom teacher that I am Muslim and I wear a hijab – and that I also pray between 1:00 and 1:30. She said that was fine and that she had a room for me to pray in.

From that day forward – I received compliments from other kids as well as school officials.

But my problems started on September 11, 2003. I was in the breakfast line when my teacher came up to me and said that after I was done eating to call my parents because my hijab looks like a bandanna or a handkerchief and that I was not allowed to wear it.

So after I was finished, I went to the office.

Mrs. Walker had already called my parents. When my parents got there they were very upset. The principal said it was a bandana and I had to change it or go home.

And this is how the battle of being obedient to God by wearing my hijab to be modest in Islam versus the school dress code policy began.

I continued to wear my hijab – because it would be against my religion not to.

So – like I said before, I was suspended from school on October 1st for 3 days. When I came back to school on October 7th – I was suspended again. This time it was for 5 days.

I was able to go back to school after that until the problem was fixed.

This experience has been very stressful, very depressing and humiliating.

But thanks to the Department of Justice, the Rutherford Institute and my lawyer, Mrs. Leah Farish, the problem no longer exists in the Muskogee Public Schools. The school agreed to let me and other kids wear our religious clothing.

Thank you for listening and thank you very much for having me here today!

**Testimony of Senator Mary Landrieu**
**Before the Senate Subcommittee U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights**
**Hearing on Religious Expression in the Public Square**
**June 8, 2004**

Thank you, Mr. Chairman, for inviting me to testify before the Subcommittee today at this important hearing on the public expression of religion. I want to begin my testimony with a quote from Benjamin Franklin, who I think of as a philosopher of democracy. He asked a very important question at the Constitutional Convention: "In the beginning of the contest with Britain, when we were sensible of danger, we had daily prayers in this room for Divine protection. Our prayers, Sir, were heard, and they were graciously answered.... do we imagine we no longer need His assistance?"

Mr. Chairman, we would do well to ask Benjamin Franklin's question again today. The rituals all around us indicate that we do need God's assistance for our great experiment in Democracy to work. We opened the Senate today with a prayer led by our Chaplain. It is a tradition has been followed from the beginning of our nation – over 200 years – and the Senate and our nation is stronger for it. We are stronger because we acknowledge a power higher than our selfish interest. We are stronger because we honor the free practice of all religions. Our nation is stronger because our government does not endorse one religion over another. But while we maintain a separation between church and state, we do not separate God from state.

Mr. Chairman, this hearing could not be more timely. The United States Supreme Court is expected to announce a decision in the case of *Elk Grove Unified School District v. Newdow* before the end of its current session. As members of the Subcommittee know, the Court of Appeals for the Ninth Circuit found that the phrase "under God" was not constitutional. The Pledge has been part of American life since 1942 and Congress added "under God" to the Pledge in 1954.

Like all of my colleagues, I was shocked by the Ninth Circuit's decision. The day the decision was announced back in June of 2002, I introduced a constitutional amendment that simply says that references to God in the Pledge of Allegiance and on our currency do not affect an establishment of religion in violation of the First Amendment. It has been reintroduced in the 108th Congress as Senate Joint Resolution 7. Senators Murkowski, Stevens, and Chambliss are cosponsors. I would ask that a copy of S.J.Res. 7 be placed in the record at the conclusion of my remarks.

Mr. Chairman, you do not need to be a legal scholar to know that the *Newdow* decision is an affront to common sense. References to God are found in every one of our founding documents from the Declaration of Independence to the Constitution, as well as in the Pledge of Allegiance. President James Madison, whom we appropriately acknowledge as the Father of the Constitution, wrote to the Virginia General Assembly:

> We have staked the whole future of American civilization, not upon the power of government, far from it. We've staked the future of all our political institutions upon our capacity...to sustain ourselves according to the Ten Commandments of God.

Those of you on the Committee, who have studied the writings of the Founders understand that there was a broad difference among them about the nature of God, and the role that religion played in their personal lives. But I do not think you could find anyone present at the creation of our nation that doubted that divine providence played a role in our victory over England, and in the crafting of the document that binds us together as the United States. So, when we acknowledge that history with the phrase "Under God," we do little more than reiterate something that our Founding Fathers accepted as a fundamental truth. Only something greater than themselves could create America. Something more significant than self-interest was needed to make "*e pluribus, unum*." They thought that something was the power of the divine. The Founders have almost never given us reason to doubt their wisdom.

The American experience is replete with examples of our sanctifying the acts of our government by invoking the Almighty. The phrase "In God We Trust" appears on all of our currency and is inscribed in the Senate chamber. I firmly believe that the framers of the Constitution and the First Amendment did not want to ban all references to God from public discourse when they wrote the Establishment Clause. What they wanted to prevent was the establishment of an official national religion, or the endorsement of one religion over others. They knew that many of the people who came to this country in the early colonial days left Europe because they could not freely practice their religion. The Establishment Clause also keeps the federal government from getting intimately involved in the affairs of religious organizations.

The Pledge of Allegiance expresses patriotism. It is not a prayer. It is not an endorsement of religion. The amicus brief filed by the Senate in the *Newdow* case makes this clear. The brief examines the legislative history of the Pledge of Allegiance and forcefully argues that it was a call to patriotism that acknowledges the historical role of religion in America. The Pledge of Allegiance does not interfere with religion or force one religious view on the entire country. People are free to think of God in the Pledge as a reference to any God, or they can choose to ignore the reference. Similarly, the fact that our nation's motto, "In God We Trust," appears on the currency does not mean that we are paying tribute to God when we spend money. This a ceremonial reference, not an oath. I ask that a copy of the Senate's amicus brief be made a part of the record.

S.J.Res. 7 is really very simple. All it says is that references to God in the Pledge of Allegiance and on our currency do not violate the Constitution. It is narrowly drawn and rooted in common sense. It is not intended to coerce anyone to recite the Pledge of Allegiance in public or in a school. If someone has a religious-based or other objection to reciting the Pledge, they have the right to not recite the Pledge.

The founding fathers wanted amending the Constitution to be an extraordinary remedy for change, so I do not take what I have proposed lightly. However, the Ninth Circuit simply went too far. The separation of church and state was intended to ensure neutrality between faiths by our government, not to eliminate all references to religion from public life.

Mr. Chairman, the Pledge of Allegiance has been a part of the fabric of our country for 50 years. It has not been a tool of religious persecution and no harm has come from it. I hope that the Supreme Court uses common sense when it decides the *Newdow* case later this month. If it decides to overrule the lower court and upholds the reference to God in the Pledge of Allegiance, then my amendment, S.J.Res. 7, would not be necessary. I hope that ends up being the case. If the Court decides to uphold the lower court's decision, the Congress can begin the process of restoring the proper balance between church and state and to restore the historical purpose of the Pledge of Allegiance by amending the Constitution.

108TH CONGRESS
1ST SESSION

# S. J. RES. 7

Proposing an amendment to the Constitution of the United States relative to the reference to God in the Pledge of Allegiance and on United States currency.

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IN THE SENATE OF THE UNITED STATES

MARCH 3, 2003

Ms. LANDRIEU introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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# JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to the reference to God in the Pledge of Allegiance and on United States currency.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within 7 years after the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. A reference to God in the Pledge of Allegiance or on United States currency shall not be construed as affecting the establishment of religion under the first article of amendment of this Constitution.

"SECTION 2. Congress shall have the power to enforce this article by appropriate legislation.".

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Statement
*United States Senate Committee on the Judiciary*
**Beyond the Pledge of Allegiance: Hostility to Religious Experssion in the Public Square**
June 8, 2004

**The Honorable Patrick Leahy**
United States Senator , Vermont

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Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
"Beyond the Pledge of Allegiance:
Hostility to Religious Expression in the Public Square"
Hearing Before the Subcommittee on the Constitution, Civil Rights & Property Rights
June 8, 2004

In light of recent events, one might expect that a Senate subcommittee charged with ensuring civil rights would be holding oversight hearings on our government's controversial interrogation tactics. Yet today's hearing is the latest in a series of hearings on matters seemingly chosen not for their legislative urgency but because of their great political significance to some members of the Republican Party. We have already held a number of hearings this year on rewriting the Constitution to limit the first Amendment and stigmatize certain Americans. Today we will follow that pattern by focusing on another aspect of the First Amendment – the freedom to practice religion – and how some apparently perceive our independent federal courts as a threat to this constitutional right.

It is not surprising that during this election year, some who wish to divide our nation are trotting religion out with the hope that it will reap benefits on Election Day. Some partisan strategists seem to want to use religion the same way they have tried to use patriotism as a precinct organizing tool. Such abuses are insulting to the intelligence of the electorate and the deeply held personal beliefs of our nation's dedicated public servants. Faith was very important to our Founding Fathers, as it is today to so many of us. That is why they were so careful in framing our government to allow for religious freedom and to provide for the separation of church and state.

Unfortunately, last year's religious rhetoric was injected into a political debate with outrageous consequences. It started when the Chairman of the Judiciary Committee asked a controversial nominee about his religious affiliation during a confirmation hearing. Freedom from religious persecution is one of the pillars upon which our Nation and its Constitution rest. In fact our Founding Fathers thought it necessary to encapsulate that concept into the very text of the Constitution itself, in Clause 3 of Article VI. That clause reads: "..... no religious test shall ever be required as a qualification to any office or public trust under the United States."

Despite this constitutional prohibition, the question was asked and answered. Partisan political groups then used the guise of religious intolerance and bigotry to raise money and to broadcast dishonest ads that falsely accused Democratic senators of being anti-Catholic. I cannot think of anything in my almost 30 years in the Senate that has angered me more. One recent Sunday I emerged from Mass to learn that one of these advocates had been on C-SPAN at the same time that morning to brand me an anti-Christian bigot. These partisan groups are trying to divide us as a nation, and they threaten the very constitutional process designed to protect all Americans from prejudice and injustice. In a naked attempt to curry political favor, these religious smears hurt the whole country. They hurt believers and non-believers alike. I might add that a recent analysis of votes and actions of Catholic Senators based on the official positions taken on legislation by the United States Conference of Catholic Bishops also demonstrates the absurdity of the charges made against me and some of my Judiciary Committee

colleagues.

As legislators we must respect the genius of our Founding Fathers and tread lightly in the area of religion when it comes to government action. I urge my colleagues to refrain from continuing to play politics with religion.

I expect that some of today's witnesses will address legislation endorsed by several of my colleagues that would create new limits on federal court jurisdiction over religious matters. Like previous attempts to circumscribe the role of a co-equal branch of government, attempts to carve up federal jurisdiction based on subject matter are a threat to the structure of our constitutional system of government. The arguments for such a dramatic action have not changed since Senator Helms' similar attempts during the 1980s. The fundamental principle we upheld then and must uphold now is that our courts, the branch of government devoted to interpreting our Constitution and laws, must remain free of the pressures of the majority of the moment. A healthy and independent judiciary sometimes is never more necessary than at times when there is impatience with the way the Supreme Court chooses to interpret the Constitution.

No one can safely predict whose rights will depend on that independence in the future. Therefore, we favor a strong judiciary, under law, rather than a judiciary that bends first in one popular direction, then in another. But to make this system work, we can't look to the courts for a quick fix. No one should support legislation that would make courts follow the howls rather than the law.

We should not adopt proposals that will whittle away at the First Amendment for the first time in our history. We act here as stewards of the Constitution, guardians and trustees of a precious legacy. The truly precious part of that legacy does not lie in outward things – in monuments or statutes or flags. All that those tangible things can do is remind us of what is precious – our liberty.

If, God forbid, some disaster swept away all the monuments of this country, the Republic would survive just as strong as ever. But if some failure of our souls were to sweep away the ideals of Washington, Jefferson and Lincoln, then not all the rock, not all the marble, not all the flags in the world would restore our greatness. Instead, they would be mocking reminders of what we had lost.

As Americans, diversity of belief is one of the things that make us the free nation that we are. The First Amendment encompasses so many different things: the freedom of speech, the freedom to practice any religion you want, or none if you want. We are not a theocracy, we are a democracy. And because we are a democracy, all of us, especially those who may practice a minority religion, get a chance to practice it.

More than 40 years ago Justice Hugo Black, writing for the Supreme Court, noted that "a union of government and religion tends to destroy government and to degrade religion." My faith and my patriotism mean more to me because they are my choice and not manipulated by my government. In honor of the Constitution's framers, let us not abuse this forum with any more public exhibitions of who is the most pious in the land. Let's not play politics with the First Amendment or with the separation of powers.

# LIBERTY LEGAL INSTITUTE

KELLY J SHACKELFORD
Chief Counsel

HEADQUARTERS
903 East 18th St. Suite 230
Plano, Texas 75074
972-423-3131 Fax 972-423 8899
libertylegal@libertylegal org
www.libertylegal.org

HIRAM SASSER*
Director of Litigation

*Also Licensed in Oklahoma

## EXAMPLES OF HOSTILITY TO RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE

*REPORTED CASES, MEDIA ARTICLES, UNREPORTED CASES, AND LAW REVIEW ARTICLES*

**(Some of these cases were resolved correctly, many not, but they all show the hostility to religious freedom currently ongoing nationwide)**

• *From Lynn Lucas Middle School in Houston, Texas:*
A schoolteacher trashed two students' Truth for Youth Bibles and took the students to the principal's office where she threatened to call Child Protective Services on their parents for permitting them to bring their Bibles. Later at the same school, different officials threw away students' book covers with the Ten Commandments, claiming the commandments were hate speech and could offend students.

• *Girl Barred from Singing 'Kum Ba Yah,'* Washington Post, Aug. 14, 2000 at A2.
An eight-year-old girl was barred from singing "Kum Ba Yah" at camp in a talent show because the song included the words "My Lord." The camp director said, "...You have to check your religion at the door."

• Conrad deFiebre, *Suit Claims Man's Religious Freedom is Being Thwarted; A Revenue Employee Says He's Not Allowed to Display Signs on His Car or Cubicle*, Star Tribune (Minneapolis), July 2, 2004, at 3B.
A Minnesota state Department of Revenue employee Alan Blackburn was barred from parking his car in the state parking lot because of religious and political stickers placed on the car (examples include: "God is a loving and caring God," "God defines marriage as a union between a man and a woman. He also says sex is to be enjoyed between a husband and wife only"). A lawsuit was filed in support of Blackburn's rights to place whatever stickers he wants on his car.

• Joan Little, *City Schools Issue Rules About Students, Religion*, The St. Louis Post-Dispatch, July 11, 1996.
Elementary school student Raymond Raines was "caught" praying over his meal at school. He was lifted from his seat and reprimanded in front of all the other students. He was then taken to the principal who ordered him to cease praying in school.

**STUDENTS**

• *C.H. v. Oliva*, 226 F. 3d 198 (3d Cir. 2000).

Zachary Hood brought his Beginner's Bible to school to share a story about Jacob and Esau called "A Big Family" as part of class activities, but Zachary's teacher refused to allow the story to be read because it was religious. Zachary's mom filed a lawsuit to allow Zachary to share his story just as the other students were permitted to share theirs.

• *Walz v. Egg Harbor Township*, 342 F.3d 271 (3d Cir. 2003).

A pre-kindergarten student, Daniel Walz, was prevented from giving out pencils with the message "Jesus Loves the Little Children" engraved on them and later as a first grader was prevented from distributing candy canes with "The Candy Maker's Witness" attached to the candy. A lawsuit was filed to protect Daniel's rights to give gifts at school just like other children could, but the Third Circuit refused to uphold Daniel's rights to give his gifts and instead decided in favor of the school's discrimination.

• *Denooyer v. Merinelli*, 1993 U.S. App. LEXIS 20606 (August 3, 1993).

When elementary student Kelly Denooyer was selected as her class' VIP of the Week, she brought a video of her singing a solo at church to share with her class. But the teacher refused to play the tape for a variety of reasons, including concern about the videotape's religious message. A lawsuit was filed to protect Kelly's rights, but the court determined that Kelly's free expression rights were not violated by the censorship of her video.

• *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995).

Ninth grader Brittney Settle selected Jesus Christ as the topic for her open research project, but her teacher later refused to approve the subject and gave Brittney a zero for her grade and did not permit her to submit another project. A lawsuit was filed to protect Brittney's free expression rights, but the court refused to uphold Brittney's rights and found in favor of the school.

•*Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98 (D. Mass. 2003).

A student started a religious club and wanted to hand out candy canes with a religious message at school. The school denied the students' permission and the students were suspended for distributing their candy canes. The students were forced to file suit in federal court in order to enforce their right to give candy to classmates without facing suspension.

• *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D. Pa. 1991).

Fifth grader Diana Duran was a member of the Academically Talented Program, where she was assigned an independent study project. She completed the project on the Power of God as originally approved by her teacher. However, when doing her research (including a student survey of classmates' religious beliefs) and attempting to present her project to the class (as part of the assignment), school

officials intervened and prevented Diana from successfully completing the project. Diana along with her guardians filed a lawsuit to protect her First Amendment freedoms, but the court did not uphold her rights and upheld the school's action, saying she had no such rights in the classroom.

• *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996).
Students Emily and Timothy Hsu wanted to form a student Bible club at school, but were denied club recognition because the students insisted that the club have a policy permitting only Christians to serve as officers. A lawsuit was filed to protect the clubs' right to pick leaders in accordance with their faith. The court only permitted certain leadership positions to have a requirement relating to the member's faith and would not permit all leadership positions to have such a requirement.

• *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)
Through the Individuals with Disabilities Education Act (IDEA), a deaf student was entitled to access to a sign-language interpreter during the school day, so the student asked the Catalina Foothills School District to provide such an interpreter. The student attended Catholic school, and the district refused to provide an interpreter. A lawsuit had to be filed to uphold this religious student's rights.

• *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).
University of Utah acting student Christina Axson-Flynn withdrew from the acting program and left the university after her instructors heavily pressured her to perform scenes that required her to say profane words. Axson-Flynn is a Mormon and had informed the instructors of her religious objections to profane phrases during her audition for acceptance to the acting program.

• *From Northwest Elementary School in Massachusetts*
Seven-year-old Laura Greska brought a book called *The First Christmas* to fulfill an assignment that asked students to share with the class about their family's Christmas traditions, but was forbidden from sharing it with the class because it was "religious" as it centered on Jesus Christ's birth.

• *From Walker County School District in Birmingham, Alabama:*
Eleven-year-old Kandice Smith was told that she was not permitted to wear her cross to school because it would violate the dress code at Curry Middle School. The dress code was devised to hinder gang activity at the school, and only after a lawsuit was filed did the school finally decide to incorporate an exception compatible with the Alabama Religious Freedom Amendment.

• *From Kettering City School District, Ohio:*
A teacher prevented a kindergartener from giving out bags of jelly beans with a religious poem to classmates around Easter 2003. She was trying to uphold a school policy against students distributing religious literature in the classroom,

though secular messages were permitted. A lawsuit was filed in U.S. District Court in Ohio.

• *From the Flagstaff, Arizona Unified School District:*
Sixth-grader Caitlin Ribelin wanted to tell classmates about her church youth group, but her school principal prevented her from doing so because of school policies preventing distribution of religious materials not authored by students. A lawsuit had to be filed against the school district to allow religious literature to be treated the same way that secular literature is treated.

• *From Muskogee Public School District, Oklahoma:*
An 11-year-old Muslim student was suspended for wearing her religious hair covering to school, in violation of the school's dress code. A lawsuit was filed to protect the student's religious rights in federal court in Oklahoma, and the school district finally decided to settle after the U.S. Department of Justice opened an investigation.

• *From Cushing Elementary School, Delafield, Wisconsin:*
Morgan Nyman, an eight-year-old student was denied the opportunity to share the valentines that she had made by hand with her classmates because the Valentines included religious messages, which would "violate the separation of church and state" if little Morgan was permitted to hand them out. A lawsuit was filed to protect Morgan's rights, and the Kettle Moraine School District only relented after litigation, deciding to allow Morgan to pass the valentines out.

• *From the Boulder Valley School District, Colorado:*
For a class project, students were asked to select their favorite book for an oral book report. Eleven-year-old student Elizabeth Johnson selected the Bible, specifically Exodus, to share with the class, but the teacher rejected the student's choice, saying that the Bible may be "offensive" to some. Additionally, Elizabeth was told that she could not bring her Bible to school. An attorney became involved and sent a letter to the district explaining how Elizabeth's rights had been violated, and a television station contacted the school about the events. Twenty minutes after the news called, the district relented and permitted Elizabeth to select the Bible as the subject of her book report.

• *From Miami-Dade, Florida:*
Students tried to distribute business-sized cards to other students on the Miami-Dade Community College campus; the cards had a number for people to call where they could hear a recorded message about Jesus Christ. Campus security officers approached and told the students that they couldn't pass out the cards. Later, the students returned to resume handing out their cards and were approached by security officers and an administration official. When the students tried to leave, more security officers were summoned as was a police officer who threatened to arrest the students. A lawsuit had to be filed to protect the students'

rights, and the school was barred from reviewing Christian literature and could prevent its distribution only in limited circumstances.

• *From Boca Raton School District, Florida:*
Members of the Fellowship of Christian Athletes (FCA) were denied the opportunity to share a religious message on construction panels in the school as part of a beautification project. Though students were told that no profane or obscene messages were permitted, no policy was mentioned regarding religious messages. The students' messages were edited to eliminate "God" and "Jesus." A lawsuit was filed.

• *From Asa Adams School in Orono, Maine:*
Third grader Gelsey Bostick wore a t-shirt and sweatshirt that said "Jesus Christ" on them, and her teacher asked her to turn both articles inside out because they were causing a commotion and offended one of the students. Furthermore, some students construed the words "Jesus Christ" as swear words. The school reversed itself only after a religious liberties law firm intervened.

**STUDENT PRAYER**

• *Goulba v. Sch. Dist. of Ripon*, 45 F.3d 1035 (7th Cir. 1995).
After students recited the Lord's Prayer, on their own accord, before the opening of graduation ceremonies, student Nikki Goulba filed a civil contempt motion against the School District of Ripon and the Ripon High School principal, claiming that the officials violated a permanent injunction that prevented them from prayer during school graduations.

• *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996).
A lawsuit was filed challenging a school policy that permitted the graduating class to vote to determine if there would be student-led prayer during graduation ceremonies. The court struck down the policy, determining it violated the Establishment Clause and enjoined the school from permitting the prayer.

• *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001).
Lawsuit filed to challenge a school policy permitting high school seniors to use a popular vote to select a graduation speaker who could deliver a message of their choosing, without approval by school officials. The offense was that some students would use their time of speech to express religious thoughts.

• *Candler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).
A principal and student filed suit to challenge an Alabama statute, which allowed student-initiated prayer during school events.

• *Geardon v. Loudon County Sch. Bd.*, 844 F. Supp. 1097 (E.D Va. 1993) (mem.).
Parents and students filed a lawsuit challenging prayer at a high school graduation, and the court permanently enjoined the school from permitting prayer at graduation ceremonies.

• *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).
A Clear Creek ISD parent filed suit to challenge a policy permitting high school seniors to select student volunteers to give nonsectarian, non-proselytizing invocations at graduation ceremonies.

• *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003).
Two students brought suit challenging the practice of having a supper prayer at a military school in Virginia on the grounds that it violated the Establishment Clause and the court struck down the practice.

• *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).
A lawsuit was filed to challenge a school district policy permitting student-led, student-initiated prayer prior to football games, and the court struck down the policy, determining it violated the Establishment Clause. In the lower court in this same case, the judge ordered students not to pray in Jesus' name and told them that federal marshals would be on hand to take students to the Galveston County Jail, saying "Anyone who violates these orders, no kidding, is going to wish that he or she had died as a child when this court gets through with it."

• *Lee v. Weisman*, 505 U.S. 577 (1992).
In Providence, Rhode Island, principals of public school were permitted to ask clergy to give invocations and benedictions at graduation exercises, but when a middle school principal invited a rabbi to give a nonsectarian prayer, a student's parent got a temporary restraining order to prevent the prayer and sought a permanent injunction to prevent the practice of inviting clergy to perform prayers in the future.

• *Wallace v. Jaffree*, 472 U.S. 38 (1985).
A lawsuit was filed to challenge the practice of having a period of meditation and voluntary prayer in schools in Alabama.

• Frank J. Murray, *Federal Court Hears Lawsuit Over Kindergarten Christian; New York Schools May Relent, May Let Tot Say Grace at Meals*, The Washington Times, April 12, 2002.
Kindergartner Kayla Broadus prayed, "God is good. God is great. Thank you, God, for my food," with two classmates at her school in Saratoga Springs, New York at the snack table before they ate their snack. Her teacher silenced the prayer, scolded Kayla and informed the school lawyer. A lawsuit ensued over the child's prayer.

• *From Aledo Independent School District, Aledo, Texas:*
Katherine Furley was elected to pray at her graduation ceremony, but then was ordered to submit her prayer to officials. School officials then proceeded to edit, word by word, which words she could and could not pray. A lawsuit was filed to protect Katherine's right to pray without being edited by the government. The Court ruled against her right to pray without government editing.

• *From Norfolk High School, Nebraska*:

After graduating seniors voted to have prayer in their graduation, a student complained to the ACLU, who threatened legal action against the school if they permitted the prayer. At the graduation ceremony, school officials announced that there would be no praying during the ceremony.

**SCHOLARSHIP AWARDS AND VOUCHERS**

• *Locke v. Davey*, __ U.S. __, 124 S. Ct. 1307 (2004).

Josh Davey received a Promise Scholarship, which was awarded to academically gifted students with postsecondary education expenses, to use at any college in the state. He decided to pursue a double major in pastoral ministries and business management/administration. Davey was told that he could use the scholarship for any major unless he was devoted to become a pastor. The Court ruled against him.

• *Eulitt v. Me. Dep't of Educ.*, 307 F. Supp. 2d 158 (D. Me. 2004).

Though Maine state law requires free public education for kindergarten through 12th grade, the town of Minot only has schooling through the eighth grade, and the town has contracted to send their students elsewhere for high school, public school or other schools if the student has "educational program requirements that may not be offered in association with PRHS." A Minot family was denied access to public funding for child's tuition to Catholic high school, despite the fact that the state had the authority to approve payments to alternative schools, and a lawsuit was filed.

• *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

An Ohio voucher program was enacted because the public school system was in a "crisis of magnitude," and families were given voucher funds to use toward a school of their choosing. Many families elected to use their vouchers for religious schools, and as a result, a lawsuit was filed to challenge the program, claiming it established religion.

• *From Michigan:*

A Cornerstone University graduate student received a tuition grant from the state of Michigan. But when the student decided to pursue a Pastoral Studies divinity degree, the financial aid office of the university informed him that he was no longer eligible for the grant because it could not be used for divinity, theology, or religious instruction. In other words, religious studies were being treated differently than other areas of study.

**SCHOOL FACULTY AND OTHER STATE EMPLOYEES**

• *Barrow v. Greenville ISD*, 332 F.3d 844 (5th Cir. 2003).

Karen Jo Barrow was denied an assistant principal position because she refused to remove her children from private, Christian school. A lawsuit was filed to protect her rights to select a religious education for her children without suffering repercussions for it at work in the public schools. Though the district court

refused to uphold Barrow's parental rights to send her children to Christian school, the Fifth Circuit did and warded off this egregious religious discrimination on the part of the school district.

• *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).
Two Muslim police officers in Newark were required to shave their beards after the city issued an order requiring all police officers to be clean shaven. The order permitted a medical exemption, but not a religious exemption. The officers had to file a lawsuit to protect their constitutional right to free exercise of their religion.

• *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536 (W.D. Pa. 2003).
The school district suspended elementary school instructional assistant Brenda Nichol for wearing a cross necklace, finding her in violation of a district policy based on the Pennsylvania's Garb Statute, which prohibited teachers and other public school employees from wearing religious emblems or insignia. A lawsuit was filed to remedy the policy, which was overtly and openly hostile to religion, and to prevent the district from forbidding symbolic speech by employees from a religious viewpoint.

• Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994).
The Capistrano Unified School District forbade John Peloza, a biology teacher, from discussing religious matters with students the entire time he is on the school campus, even if the discussion occurs outside of class time and is student-initiated. Essentially the district had a history of reprimanding and harassing Peloza because of his worldview. Peloza filed suit to protect his constitutionally-protected free speech and equal protection rights, but the court dismissed Peloza's complaint finding that the school district's interest in avoiding an (unlikely) Establishment Clause violation trumped Peloza's rights.

• *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).
Mr. Roberts' class had a silent reading period daily, and Mr. Roberts had a library of 239 books, from which the students could select reading material. Two of the books dealt with Christianity. Mr. Roberts participated in the reading period, often choosing to read his Bible, and he kept the Bible on his desk during the school day. The school principal censored Mr. Roberts, forbade him from placing his Bible on his desk during the school day and from reading it during the school day, and forbade him from keeping the two Christian books in the library. A lawsuit was filed to end the religious bigotry against Mr. Roberts, but the court upheld the school's action and even awarded the school district court costs.

• Diane Lynne, *Petition Posted to Defend 'God Bless America,'* WorldNetDaily, Jan. 31, 2003.
Military honor guardsman Patrick Cubbage was fired for saying "God bless you and this family, and God bless the United States of America" to families as he presented a folded flag in honor of a fallen veteran. Though the families did not object to the practice, Cubbage's co-guardsmen complained to their supervisor,

and Cubbage was warned not to say the blessing to the families. Later Cubbage gave the blessing to a family after a request from the fallen veteran's son, and shortly thereafter Cubbage was fired for giving the blessing.

• Jeremy Gray, *Man Fired Over Lapel Pin Garners Support*, The Birmingham News, June 27, 2004, News.
The Hoover Chamber of Commerce fired employee Christopher Word because he wore a Ten Commandments lapel pin.

• Bill McAllister, *Gearing Up for Christmas*, Washington Post, Sept. 29, 1995, at N66.
The Post Office issued guidelines advising clerks to use words like "Happy Holidays" and to avoid any decorations with a religious theme.

• *From Logan, Kentucky:*
A public library policy prevented employees from wearing religiously-oriented jewelry, and an employee was fired for wearing a cross. A lawsuit was filed to protect the employee's right to free speech and religious freedom.

• *From Honolulu, Hawaii:*
Honolulu city employee Kelly Jenkins was prohibited from posting religious literature, like an invitation to his church, in common areas of the employee break room and employee bulletin boards because of "separation of church and state" concerns. A lawsuit had to be filed to protect Jenkins' rights.

**REGULAR CITIZENS**

• Jeffrey Spino, *Banned Yarmulke Leads to Judicial Conduct Commission Complaint*, Texas Lawyer, Sept. 30, 1996, at 5.
Judge Patricia Lykos ordered a Jewish attorney Gil Fried to remove his yarmulke in Texas Court when he was serving as an expert witness.

• *From Vermont:*
Nancy Zins attempted to purchase specialty plates in Vermont for herself and for her husband with the messages "ROMANS8" and "ROMANS5" on the plates, but her request was denied by the Vermont DMV, which claimed that the messages may be offensive. After first going through the Agency of Transportation, a lawsuit was filed to protect her free speech rights and her ability to select a message for her license plate just as other non-religious citizens are free to do.

• *From Northglenn, Colorado:*
A coach shared his faith as he coached swimming in the city recreation facility. The city recreations director sent the coach a letter, informing him that he was no longer welcome on the premises of the city recreation facility. A concerned parent inquired to the city to find out why the coach had been banned and was told that the coached used offensive language. Upon further investigation, the parent discovered that the coach's preaching was the problem. A lawsuit was filed to protect he man's rights to access the city recreation facility.

**IN THE SCHOOLHOUSE**

• *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002).

Columbine High School hosted a tile-painting project, so students could express themselves following the school's tragedy. Some students expressed themselves with religious symbols, including a victim's sister who incorporated a small yellow cross in her tile design. After the tiles were posted, the school officials eradicated the religious symbols from the tile display, so a lawsuit was filed to prevent the school officials from censoring the religious expression of the students. Unfortunately, the court chose not to uphold the students' expression rights and instead validated the school's censorship.

• *Demmon v. Loudoun County Pub. Sch.*, 279 F. Supp. 2d 689 (E.D. Va. 2003).

For a school fundraiser, people could purchase bricks and have text and symbols inscribed on the bricks to be used in a sidewalk surrounding the school's flagpole, and some purchasers elected to have a Latin cross inscribed. A parent complained about the crosses, so the school district removed all the crosses. A lawsuit was filed to protect the religious expression from censorship.

• *Selman v. Cobb County Sch. Dist.*, 2004 US Dist. LEXIS 5960 (N.D. Ga. 2004).

A Georgia School District decided to place a sticker in new science textbooks explaining that evolution was a theory, not a fact, and encouraging students to study with open minds and critical thinking skills. But a handful of parents complained that the sticker restricted teaching evolution and promoted creationism and filed a lawsuit to prevent its use, under the guise that such a sticker violated the Establishment Clause.

• *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

The Milford Central School denied the Good News Club use of the school's facilities after school. A lawsuit was filed to protect the religious group's right to use the school's facilities just like other organizations could, without being discriminated against because it is a religious group. The case had to go all the way to the Supreme Court before the religious group was vindicated because the lower courts both upheld the school's unlawful religious discrimination.

• *Widmar v. Vincent*, 454 U.S. 263 (1981).

The University of Missouri at Kansas City refused to allow a religious student group access to university facilities as other student groups were permitted to do. The students were forced to file a lawsuit in order to protect their rights to equal access. They simply desired for their religious organization to be afforded the same rights as other student organization.

• *Wigg v. Sioux Falls Sch. Dist.*, 274 F. Supp. 2d 1084 (D.S.D. 2003)

A school district refused to allow a teacher to participate in a Good News Club meeting at the school after school hours, so the teacher filed suit to protect her rights to assemble with the religious group. The court only partially protected

her rights, ruling that she could attend Good News Club meetings, but arbitrarily determined that she only had the protected right to participate in meetings at schools other than where she taught.

• *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).
The school board refused to allow students to form an extra-curricular Christian club, claiming such a club would violate the Establishment Clause, despite the fact that various other clubs met at the school. A lawsuit was filed to protect a Christian group from being unlawfully discriminated against by a school board.

• *Ceniceros v. Bd. of Trs. of the San Diego Unified Sch. Dist*, 106 F.3d 878 (9th Cir. 1997).
The school district refused a religious club the opportunity to meet during non-instructional lunchtime, though other groups could. A lawsuit was filed on behalf of the students to prevent the district's unlawful discrimination and to uphold the students' rights under the Equal Access Act. The case went to the Ninth Circuit before the students were finally afforded their constitutional protection.

• *Edwards v. Aguillard*, 482 U.S. 578 (1987).
A suit was filed to challenge Louisiana's Creationism Act. The Creationism Act provided that if evolution is taught in public schools, creation science must also be taught. And if creation science is taught, then evolution must be taught as well. The suit sought to strike down the act under the guise that it violated the Establishment Clause, and the Supreme Court obliged, striking down the Creationism Act.

• *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997).
A school choir's repertoire included Christian music and occasionally sang at a church, and a Jewish choir student's family filed a lawsuit, essentially asking the court to censor the choir from singing any religious music. The case reached the Tenth Circuit before the unlawful religious censorship threat was abated.

• *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).
The University of Virginia denied a student journal funding from the school's student activity fund because of the journal's religious viewpoint. The student filed a lawsuit to challenge the guidelines for disbursement of student activity funding because the guidelines were used to discriminate religious viewpoints. The lawsuit had to go all the way to the Supreme Court just to have the student's constitutionally-guaranteed rights upheld.

• *Chandler v. James*, 985 F. Supp. 1068 (D. Ala. 1997).
Plaintiffs ("civil liberties activists") filed a lawsuit and succeeded in permanently enjoining school board and public officials from accommodating religious activity in schools. The court determined that the school officials' behavior had violated the Establishment Clause because they permitted prayer at school functions,

excused students from school for baccalaureate services, and permitted religious study with non-school persons during school hours.

- *Child Evangelism Fellowship v. Montgomery County Pub. Schs.*, 2004 U.S. App. LEXIS 13487 (4th Cir. 2004).
  The Montgomery County Schools refused to allow the Child Evangelism Fellowship (CEF) to participate in the district's take-home flyer forum to distribute flyers about the Good News Club, citing fears about the separation of church and state. A lawsuit was filed to protect the rights of CEF to participate in the flier program just as other organizations were permitted to do and to force the school district to cease the religious discrimination.

- *Child Evangelism Fellowship of New Jersey v. Stafford Township*, 233 F. Supp. 2d 647 (D.N.J. 2002).
  A religious organization was denied permission to post fliers, pass fliers out, staff tables at back-to-school-night or allow students to pass materials to other students about a religious club forming in schools. A lawsuit was filed to protect the right of a religiously-affiliated organization to utilize the same forums that were afforded to other groups and to prevent the school board from discriminating based on a religious viewpoint.

- *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000).
  Parents of children attending the Vanguard Charter School Academy claimed that the school violated the Establishment Clause because a mom's prayer group met in the parent room, teachers and staff prayed (on their own accord) on school property, religious materials were distributed in student's folders (a content neutral forum), and the school taught morality. These parents filed a lawsuit to prevent the school from permitting the religious activity at the school.

- *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).
  A student and her father filed a lawsuit because the school permitted employees to be involved with student prayer after basketball games, permitted the choir to use a Christian song as its "theme song" and permitted the distribution of Gideon Bibles to fifth grade classes. The court upheld the right of the choir to sing the religious song but struck down the employees' involvement with prayer, determining that such an exercise violated the Establishment Clause.

- *Mitchell v. Helms*, 530 U.S. 793 (2000).
  Under the Education Consolidation and Improvement Act of 1981, government aid for materials and equipment was provided to public as well as private schools. A lawsuit was filed by parties claiming the law violated the Establishment Clause simply because private schools, including religious schools, received a benefit from the act, which the parties claimed served as an establishment of religion.

- *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998).

A school board policy permitted religious groups to provide religious materials and Bibles to students on one designated day each school year, but a lawsuit was filed to strike down the policy.

• *Powell v. Bunn*, 185 Ore. App. 334 (Or. Ct. App. 2002)
An Oregon school district allowed the Boy Scouts to present information on membership to students, but a parent filed suit, challenging the policy on the grounds that it violated the Establishment Clause.

• *Rusk v. Crestview Local Schs.*, 220 F. Supp. 2d 854 (N.D. Ohio 2002).
School permitted non-profits, including religious non-profits, to submit flyers to the school for distribution to the students' mailboxes, and a parent filed a lawsuit, objecting to the religious groups being able to submit flyers, even though the flyers did not advocate the religion and were not proselytizing. The court half-heartedly upheld the religious groups' rights to utilize the mailbox distribution, but the court only permitted the groups to distribute certain messages and censored information relating to a religious or sectarian event.

• *Skoros v. City of New York*, 2004 U.S. Dist. LEXIS 2234 (E.D.N.Y. 2004).
A Catholic parent objected to policy of excluding a Crèche from New York City Schools' holiday displays while permitting Menorahs, the Star and Crescent and Christmas Trees. A lawsuit was filed to remedy the exclusion of the Crèche. The court determined that it was appropriate to exclude the Crèche as it was still a religious symbol while the others had become secularized and that a child would not perceive an endorsement of the Judaism or Islam or disapproval of Christianity.

• *Washegesic v. Bloomingdale Public Schs.*, 33 F.3d 679 (6th Cir. 1994).
A portrait of Jesus Christ hung in a hallway of a school, and a former student filed suit against the school, asserting that the portrait was an Establishment Clause violation, and the court agreed and decided that the picture must be removed.

• Lisa Falkenberg, *Policy Involving Evolution Prompts Federal Inquiry*, Associated Press, Jan. 29, 2003, BC cycle.
The story details how Texas Tech professor Michael Dini discriminated against students on the basis of their religion, and the university stood behind the professor saying the professor's policies were not in conflict with those of Texas Tech.

• Ryan McCarthy, *School Rallies to Retain Sigh; The ACLU Says the Message 'God Bless America' Divides Kids by Religion and is Unconstitutional*, The Sacramento Bee, Oct. 6, 2001.
In the wake of Sept. 11, 2001, Breen Elementary School in Rocklin, California had a sign posted that said 'God Bless America,' and the ACLU intervened in an attempt to have the sign removed, calling it a clear violation of the U.S. and California constitutions and divisive.

- Barbara Vobejda, *School Officials Weigh Sachs' Ruling on Religious Gatherings*, Washington Post, Dec. 8, 1984, B3.
  Maryland Attorney General Stephen H. Sachs ruled that Catonsville High School students could continue their informal religious activity of gathering to read the Bible during their Thursday lunch hours. School administrators were worried about the ruling because they feared it would create problems in a "sensitive area." Additionally, in Prince George's County school administrators renamed Christmas trees and Christmas pageant, holiday trees and holiday pageant respectively.

- *From Oswego County, New York:*
  The Mexico Academy High School decided to start removing bricks that had been purchased and inscribed as part of a school fundraiser if the brick contained a Christian message. A lawsuit had to be filed to protect the free speech and equal protection rights of citizens who had purchased the bricks and to prevent the religious censorship.

- *From Crosby-Ironton High School in Crosby, Minnesota:*
  The Crosby-Ironton High School censored the Lunch Bunch, a Christian group, from using fliers to describe their group and to promote the See You at the Pole event. A lawsuit was filed to protect the students' rights, the same rights afforded to other student organizations.

- *From Los Angeles Unified School District:*
  The Los Angeles Unified School District tried to force a "Good News Club" to pay fees to utilize school facilities, but did not require fees from the Boy Scouts or the YMCA. A law suit was filed, seeking to grant religious groups equal access to school facilities.

- *From Montgomery County Public Schools, Maryland:*
  A school policy prevented students from receiving credit for their religious community service to fulfill the 60-hour community service graduation requirement. Students who worked at a Vacation Bible School on an Indian Reservation were not permitted to count that time toward their hourly requirement. Attorneys intervened and the students were permitted to count the hours, but, unfortunately, the policy remains and continues to discriminate against students who participate in religiously-based community service.

- *From Dillon, Montana:*
  Motivational speaker Jaroy Carpenter was prevented from speaking at an assembly in the Dillon Middle School because he was an evangelical Christian and affiliated with the Dawson McAllister Association. He was prevented from speaking despite the fact that he had previously spoken in over 200 secular schools, and he agreed to omit discussions of his religious faith and references to a youth rally being held nearby. A lawsuit was filed to protect Carpenter's rights.

• *From Carl Sandburg Community College, Indiana:*
Cosmetology teacher Louise Piggee was reprimanded severely and denied a contract renewal after she shared some religious literature outside of the classroom with a student with whom she had developed a relationship. A lawsuit was filed.

• *From Reno, Nevada:*
School officials sought to prevent a Bible club from disturbing candy canes with the message "Jesus Loves You" attached to it.

• *From Northville High School in Michigan:*
A Bible club was told it would have to meet before or after school and not during seminar period as other groups are permitted to do because of the religious nature of the group. Bible club members filed suit to protect their right to meet without being discriminated against because their group was religious.

• *From Panama City, Florida:*
A school principal changed the name of the Bible Club from Fellowship of Christian Students to Fellowship of Concerned Students without conferring with student members.

• *From Beaumont Independent School District, Texas:*
The superintendent started a "clergy-in-schools" program, which allowed clergy to mentor students, but the Americans United for Separation of Church and State filed suit seeking to strike down the program.

• *From South Tama Community School District, Iowa*:
The community center denied the Fellowship of Christian Athletes (FCA) access to facilities, so an FCA member complained and a demand letter was sent to the school district, informing them of the situation. Only then, did the school district back down and change their policy to stop discriminating against religiously affiliated groups.

• John M. Hartenstein, *A Christmas Issue: Christmas Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion*, 80 Calif. L. Rev. 981 (1992).

**RELIGIOUS HOLIDAY OBSERVATION**

• *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995).
A teacher filed suit in objection to teachers being permitted to take Good Friday off with pay, claiming the practice violated the Establishment Clause.

• *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999).
A citizen filed suit to challenge the Indiana policy of giving state employees Good Friday as a day off with pay, claiming that the policy established religion.

• *Freedom From Religion Foundation v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996) (mem.).

An anti-religion group filed suit to challenge a Wisconsin statute that recognized Good Friday as a holiday, claiming that designating Good Friday as a holiday violates the Establishment Clause. The court agreed, finding that the Establishment Clause was violated.

• *From Garden City Long Island, New York:*

Teachers in Garden City Long Island wanted to use personal days to observe religious holidays, which is one of listed permissible uses for a personal day, but when some Catholic teachers requested to use a personal day for Holy Thursday and some Jewish teachers wanted to use a personal day during Passover, they were denied and were forced to go to arbitration to prevent the religious discrimination.

**EQUAL ACCESS , CHURCH AND RELIGIOUS GROUP DISCRIMINATION**

• *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342 (2003).

The Bronx Household of Faith filed suit to prevent the New York public schools from discriminating against churches. The public schools refused to allow churches to use school facilities, but permitted other community groups to have access. The church brought suit so it could be treated just like any other community group wanting to use the facility.

•*Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520 (1993).

The Church of the Lukumi Babalu Aye sought to set up a church in Florida; the church practices Santeria, a religion which incorporates animal sacrifice into its religious practices. Upon hearing of the church's plan to develop a church in the city, the city counsel held an emergency meeting and passed ordinances which would prevent the church from practicing the animal sacrifice, an essential part of the church's free exercise. A lawsuit was filed to protect the church's right to free exercise.

• *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

A New York school board denied a church after-hours access to a school to exhibit a film series about Christian family values because of a policy prohibiting use by any group for religious purposes. A lawsuit was filed to protect the church's right to have access to the school premises. The church should not be treated like a second-class citizen because it is religious.

• *Liberty Christian Center v. Bd. of Educ.*, 8 F. Supp. 2d 176 (N.D.N.Y 1998).

A suit was filed after the Board of Education of Watertown, New York denied the Liberty Christian Center (LCC) access to the Watertown High School Cafeteria during non-school hours. A lawsuit was filed to prevent the Board from discriminating against a religious group and denying its rights to equal access.

• *Amandola v. Town of Babylon*, 251 F.3d 339 (2d Cir. 2001).

Pastor John Amandola's church Roman Chapter Ten Ministries, Inc. had obtained a permit to use the Babylon's Town Hall Annex to hold worship services, but when an angry resident called the city to complain about the facilities being used for church services, the town revoked the permit. The church filed suit to protect their right to access the community facilities and to end the religious bigotry.

• *Church on the Rock v. City of Albuquerque*, 84 F.3d. 1273 (10th Cir. 1996).
City prevented senior citizens groups from presenting a Jesus video, giving Bibles away or having sectarian instruction and religious worship at the senior center. So,a lawsuit was filed to challenge the city's policy, which was unconstitutionally restricting religious expression.

• *Ehlers-Renzi v. Connelly Sch. of the Holy Child*, 224 F.3d 283 (4th Cir. 2000).
An ordinance in Montgomery County, Maryland accommodated churches by exempting them from acquiring a special permit before constructing a school on church property, but a lawsuit was filed in an attempt to strike down the law.

• *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).
The Findlay Board of Education permitted the Findlay Weekday Religious Education Council to operate before and after school hours in the public schools in accordance with "Community Use of School Facilities," but parent-taxpayers complained about the program because of concerns regarding the Establishment Clause and filed a lawsuit in hopes of striking down the program.

• *Moore v. City of Van*, 238 F. Supp. 2d 837 (E.D. Tex. 2003)(mem.).
The City of Van had an unwritten policy of refusing to permit a group to access the Van Community Center if the use was for a religious purpose, so citizens seeking to use the center for religious purposes filed suit to protect their rights and to prevent the city from having policies that discriminate against religious groups.

• *From New York City:*
A New York City pastor wanted to use the Woodside Community Center, located in a public housing development, to host a Bible study for New Yorkers following the attacks on September 11, 2001. The pastor was denied his request because religious services (unless connected to a family oriented event like a wedding) were prohibited. A lawsuit was filed to prevent the community center from treating religious groups differently than other groups.

• *From the Church of Christ in Hollywood, California:*
Former church member Lady Cage-Barile began to intimidate and harass members of the church and interrupt and disrupt Bible studies, so the church informed her she was no longer welcome on church property. When the church sought an order barring Cage-Barile, the court denied it, and the church was forced to go to the California Court of Appeals to enforce its right to exclude trespassers from church premises.

• *From Mitchell County, Texas:*

The public library in Mitchell County, Texas tried to deny Rev. Seneca Lee access to a room to hold a meeting about political and social issues from a Christian Perspective because of a library policy that prevented religious groups from using the meeting room. After a lawsuit was filed, the library changed their policy of discriminating against religious groups.

• *From Plano, Texas:*

The city of Plano attempted to prevent the Willow Creek Fellowship from opening because of the slant of the roof, despite the fact that no ordinance existed relating to the angle of the room and despite the fact that a school just down the street from the church had an identical angle. Only after threat of a lawsuit did the city relent and permit the church to open.

• *From Cassadaga, Florida:*

A church was refused zoning approval for a church after they had purchased land outside of Cassadaga, which was a violation of Religious Land Use and Institutionalized Persons Act (RLUIPA). A lawsuit was filed in Federal Court, and the county settled, ending the lawsuit and permitting the church to locate in Cassadaga.

• *From the Dallas Independent School District in Texas:*

Reunion Church had leased an empty high school on Sunday morning for services, but the school district evicted the church in the middle of the lease, citing the "separation of church and state." A lawsuit was filed to protect the church's equal access, and the school district changed their policy to grant religious groups the same treatment as non-religious organizations.

• *From the Cave Creek School District, Arizona:*

The Cave Creek public school district passed a policy allowing non-profit community groups to meet in public schools without charge, but the policy excluded churches. A church was charged $1,200 under the policy to access the school. An attorney got involved to explain the constitutional issues associated with the policy and to request records under the Freedom of Information Act to determine how much the school had charged other groups during the previous three years. As a result of the intervention, the school district decided to revise the discriminatory policy and reimbursed the church for their money.

• *From Lebanon, Indiana:*

A minister and a church member from Grace Baptist Church were prohibited from distributing religious literature in a public park, though the minister had distributed materials for years in the park. A lawsuit was filed to protect the minister's rights.

• *From Ontario, California:*

The Church of the Light bought some land in Ontario after determining that the property was zoned so that it could contain religious assembly. However, the city passed an ordinance requiring new churches to obtain a permit before building, and five days after the ordinance was passed, Ontario's Development Advisory Board denied the church's permit applications, claiming the denial was because of allegations that the church was a cult. A lawsuit was filed to protect the church's rights to build.

• *From Balch Springs, Texas (Barton v. City of Balch Springs):*
Senior citizens were told to stop their 20-year-old practice of praying before their meals, having an inspirational religious message, and singing gospel songs in their Senior Citizens Center because of a new city policy banning religion in public buildings. A lawsuit was filed to defend the seniors' rights.

• *From Dunedin Public Library in Tampa, Florida:*
The Liberty Counsel was denied access to the library's community meeting room for a meeting relating to America's Christian History and the influence of the Ten Commandments, a historical presentation from a religious perspective, which was open religious viewpoint discrimination.

• *From San Fernando Valley, California:*
The Child Evangelism Fellowship (CEF) applied to the Los Angeles Unified School District to use the Chase Street Elementary School in Panorama City to host a Good News Club. The school policy permitted use by civic and community groups, but prevented use by "sectarian of denominational religious exercises or activities." So, the CEF applied through the Real Estate branch and was willing to pay application and rental fees, which is not required of all other groups, but CEF was still denied. A lawsuit was filed to gain equal access for the religious group and to prevent the school district's religious discrimination.

**HOLIDAY DISPLAYS**

• *ACLU of NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001).
The ACLU, along with some citizens, filed a lawsuit to challenge a holiday display consisting of a crèche with traditional figures, a lighted tree, urns, candy cane banners, a menorah, and signs commenting on celebrating diversity and freedom as well as wishing passer-bys Merry Christmas and Happy Hanukkah.

• *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677 (D. Mass. 1998).
Somerset resident filed a lawsuit challenging Somerset's Christmas display, which includes a Nativity crèche, holiday lights, a wreath, a Christmas tree and a plastic Santa Claus. The display had been a Somerset tradition for 60 years.

• *Lynch v. Donnelly*, 465 U.S. 668 (1984).
Pawtucket, Rhode Island has an annual Christmas display in the city's shopping district, which is owned by a nonprofit, and it includes a Santa house, Christmas

tree, a "Seasons Greetings" banner, and a crèche, which had been a staple of the display for over 40 years. A lawsuit challenged the display and specifically the inclusion of the crèche.

• *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986).
The ACLU filed suit to expel a crèche from the annual holiday display at city hall, claiming it violated the Establishment Clause.

• *ACLU of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999).
The ACLU filed suit to challenge a holiday display, which included a crèche and a menorah, claiming the display violated the Establishment Clause.

• *ACLU of Kentucky v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988).
The ACLU filed suit to challenge a nativity scene on the Kentucky Capitol, seeking an injunction preventing the continued use of the nativity scene, claiming the nativity scene was an endorsement of religion.

• *ACLU v. City of Florissant*, 186 F.3d 1095 (8th Cir. 1999).
The ACLU filed suit to challenge a holiday display at the city Civic Center in Florissant, Missouri on behalf of a resident who was offended by the inclusion of the crèche in the holiday display.

• *ACLU of New Jersey v. Schundler*, 104 F.3d 1435 (3d Cir. 1997).
The ACLU along with some citizens filed suit challenging a holiday display containing a crèche and a menorah on city hall property.

• *Americans United for Separation of Church and State v. City of Grand Rapids*, 1992 U.S. App. LEXIS 7513 (6th Cir. 1992).
Americans United filed suit to prevent a menorah from being placed on Calder Plaza in Grand Rapids during the Chanukah celebration, claiming the placement of the menorah established religion. The court struck down the display, determining that the city appeared to be endorsing religion because of the display.

• *Calvary Chapel Church, Inc. v. Broward County*, 299 F. Supp. 2d 1295 (S.D. Fla. 2003).
Broward County, Florida hosts the Holiday Fantasy of Lights in a public park as a city fundraiser. A church wanted to contribute to the event and have a display that included the words, "Jesus is the Reason for the Season," but the city refused to allow it. The church filed a lawsuit in order to protect their constitutional rights to participate in the city event without having their message being censored because it was religious.

• *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).
The board responsible for regulating the Ohio State Capitol Square refused a permit to a group wanting to display a cross during the 1993 Christmas season, so a lawsuit was filed.

- *Comty. for Creative Non-Violence v. Lujan*, 908 F.2d 992 (D.C. Cir. 1990).
  The Park Service has hosted a "Christmas Pageant of Peace" on White House grounds since 1954 which the National Christmas Tree, a Nativity Scene, and live reindeer. The Park Service declined to include a sculpture from the Community for Creative Non-Violence, and the Community filed suit.

- *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).
  The ACLU challenged a holiday display, and the Supreme Court held that a menorah in front of the City-County Building for a seasonal display did not violate the Establishment Clause, though a crèche in the county courthouse did.

- *Doe v. Small*, 934 F.2d 743 (7th Cir. 1991).
  Citizen filed a lawsuit to challenge a city annual yuletide display, which included 16 large paintings showcasing events in the life of Jesus Christ, in hopes of eradicating the religious expression from the public square and striking down the yuletide display. The court struck down the long-standing tradition of including the 16 pictures of Jesus, finding that such a display endorsed religion and as such violated the Establishment Clause.

- *Doe v. City of Westland*, 1987 U.S. Dist. LEXIS 15321 (E.D. Mich. 1987).
  Doe, supported by the ACLU, brought a lawsuit to challenge a Christmas display in the Westland central city complex because it included a nativity scene.

- *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989).
  Lawsuit challenged a menorah display during December, and the court struck down the display of the menorah on the grounds that such religious expression offended the Establishment Clause.

- *King v. Village of Waunakee*, 517 N.W.2d 671 (Wis. 1994).
  Citizens filed a lawsuit challenging a crèche display during the Christmas season, seeking to eradicate the religious symbol from the public square.

- *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989).
  Plaintiff Rachel Mather challenged the holiday display in front of Village Hall in Mundelein, alleging that the display included a crèche and gave her a sense of inferiority because she's Jewish.

- *Soc'y of Separationists, Inc. v. Clements*, 677 F. Supp. 509 (W.D. Tex. 1988).
  The Society of Separationists filed a lawsuit challenging the "Christmas Carol Program," which is an annual event in the Texas Capitol when a Christmas tree is presented to Texas, politicians make speeches, the Texas Public Employees Association presents money to charity, Santa visits, singers perform Handel's Messiah and two religious carols are performed. The Separationists asserted that the program violates the Establishment Clause and sought a preliminary injunction to prevent the program from occurring.

• Terry Mattingly, *On Religion: Things Got Rough on Church-State Front This Holiday Season*, Naples Daily News, Jan. 17, 2004.
The article chronicles the Christmas Season and the drama relating to public displays of celebration, including a story on firefighters in Glenview, Illinois who removed Christmas lights after neighbors complained of being offended. In addition, a pastor in Chandler, Ariz. complained that the public library display excluded Christmas and only included Hanukkah and Kwanzaa. The library took down the entire display, rather than augment the display with some information about Christmas. And in Tallahassee, Florida, a controversy erupted when a Jewish Chabad offered to help purchase a menorah for the courthouse yard and the ACLU threatened suit.

**CITY SEALS, MOTTO, SCULPTURES, AND THE PLEDGE**

• *ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001).
The ACLU filed a lawsuit challenging Ohio's motto, "With God, All Things Are Possible."

• *Gaylor v. U.S.*, 74 F.3d 214 (10th Cir. 1996).
The Freedom from Religion Foundation along with some citizens challenged the use of the national motto on the U.S. currency in federal court.

• *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998).
The ACLU challenged the placement of a cross on Stow's city seal, claiming that the use of such a symbol served as an establishment of religion. Unfortunately, the ACLU prevailed in the lawsuit because the court found that a reasonable observer would perceive the cross on the seal as an establishment of religion with the effect of advancing or promoting Christianity, and the city was forced to remove the cross.

• *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991).
The Society of Separationists and some other citizen plaintiffs challenged the use of religious symbols on city seals in Rolling Meadows and Zion, Ill. The Rolling Meadows seal contained a Latin cross and was adopted in 1960 and the Zion's seal contained a Latin cross and a dove carrying a branch and was adopted in 1902. The court struck permanently enjoined the cities from using the long-standing seals, considering the use of the religious symbols to violate the Establishment Clause. The decision effectively eradicated both cities' religious history and influence from the city seals.

• *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).
A small group of citizens filed suit and claimed that the 130-year-old seal of the Superior Court of Richmond County violated the Establishment Clause and was unconstitutional because the image included a portrayal of the Ten Commandments tablets.

• *Robinson v. City of Edmond*, 68 F.3d 1226 (10th 1995).

Plaintiffs filed suit to challenge the use of a Latin or Christian cross on the Edmond's city seal, which was adopted in 1965 through a competition through the City Counsel and the local newspapers. The cross reflected the historical importance of the Catholic Church in the development of the southwest, but the court held that the seal established religion and struck down the use of the cross, eradicating the historical significance of religion from the seal.

• *Lambeth v. Bd. of Comm'rs*, 2004 U.S. Dist. LEXIS 11195 (M.D.N.C. 2004).
A pair of attorneys filed suit claiming that a display of the national motto on the Davidson County Governmental Center violates the Establishment Clause.

• *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996).
The City of San Jose installed and maintained a sculpture ("Plumed Serpent" - of Aztec mythology) to commemorate the Mexican and Spanish contributions to the city's culture. When people began to bring flowers and burn incense at the sculpture, citizens filed suit claiming the sculpture violated the Establishment Clause, but the court upheld that sculpture.

• *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989).
A citizen sued the city claiming an illuminated Latin cross on a city water tower violated the Establishment Clause, and the court determined that the cross violated the Establishment Clause and enjoined the city from keeping the cross on the water tower, expunging the religious expression from the public square.

• *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991).
The Society of Separationists brought suit challenging city insignia of Austin because it included a cross, but the court upheld the city's insignia against the censorship attempt.

• *Myers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262 (E.D. Va. 2003)(mem.).
A lawsuit was filed challenging the constitutionality of two Virginia statutes, one that required students in public schools to say the pledge of allegiance and the other required the national motto to be posted at Virginia schools.

• *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2002).
Atheist Michael Newdow filed suit to remove the words "under God" from the Pledge of Allegiance. Newdow's daughter attends public elementary school where students recite the Pledge as part of the morning activities. Newdow filed suit claiming that his daughter was injured because she was compelled to witness her teacher lead her classmates in a ritual where they were proclaiming there is a God and that our nation is under God.

• *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002).
A citizen challenged the constitutionality of a cross erected in Mt. Soledad Natural Park, which is owned by San Diego. The court found that the city violated

the California Constitution by keeping the cross and forbade the city from maintaining the cross.

• Hugo Martin, *Facing ACLU Complaint, City to Drop Seal's Cross*, L.A. Times, April 29, 2004, at B1.
The ACLU threatened a lawsuit against the city of Redlands if the city did not remove a cross from the city's seal. The city removed the cross rather fight a legal battle against the ACLU, despite many protests from citizens wanting the seal to retain the cross.

• Sue Fox, *Facing Suit, County to Remove Seal's Cross*, L.A. Times, June 2, 2004, at B1.
The ACLU threatened a lawsuit if Los Angeles County did not remove a cross from the county's seal. The county succumbed to the ACLU's pressure and decided to remove the cross. The cross had adorned the seal since 1957 along with a cow, tuna fish, Spanish galleon, the Hollywood Bowl, and the Goddess Pomono. The region was settled by Catholic missionaries and the cross memorialized that historical fact.

• *From Springfield, Missouri:*
The ACLU filed a lawsuit challenging the use of an ichthus (i.e. a Christian fish symbol) on the city of Republic's seal, and a federal judge ordered the city to remove the symbol.

• *ACLU Finds Gold at the Foot of the Cross*, Chattanooga Times Free Press, June 24, 2004, B7 (editorial).
The editorial outlines the amount of money the ACLU receives in attorneys' fees from challenging Ten Commandments displays, religious symbols on city seals, and the Pledge of Allegiance. When a city loses one of these battles in court, the city must pay the ACLU, into the tens of thousands to the hundreds of thousands of dollars.

• John E. Thompson, *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 Harv. C.R.-C.L. L. Rev. 563 (2003).

<u>TEN COMMANDMENTS</u>

• *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), aff'd per curiam, 15 F. 3d 1097 (11th Cir. 1994).
Plaintiffs filed suit challenging a framed panel of Ten Commandments and the Great Commandment displayed at the county courthouse. The court concluded that the displays were unconstitutional, but the court allowed a stay so that the county could incorporate non-religious, historical items, which according to the court, would transform the display to fit within constitutional guidelines.

• *Ind. Civ. Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).
The Fraternal Order of the Eagles donated Ten Commandments plaques to communities across the U.S. in the 1950s, including one to the Indiana Statehouse

in Indianapolis, which was destroyed in 1991 by a vandal. An Indiana State Representative planned a replacement monument consisting of the Ten Commandments, the Bill of Rights, and the Preamble to the Indiana Constitution, but a lawsuit was filed challenging the proposed monument on the grounds that it would establish religion. The court did indeed find that such a monument would violate the Establishment Clause as citizens may not understand the connection between the display and our nation's legal history and think the monument was erected for religious purposes.

• *Kimbley v. Lawrence County, Ind.*, 119 F. Supp. 2d 856 (S.D. Ind. 2000).
Civil liberties groups filed suit in response to a proposed Ten Commandments display, which had been authorized by state law, seeking to prevent the display.

• *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003).
In the 1960s, the Fraternal Order of the Eagles (FOE) donated a Ten Commandments display to the city, and in the 1980s, citizens complained about the display. The city sold the portion of land on which the monument was located to FOE and placed signs stating that FOE owned the property and that the city did not endorse religion. This did not satisfy the Freedom from Religion Foundation and some citizens, and the organization filed a lawsuit still seeking to strike down the display. The court held that despite the fact that the city had sold the land to a private organization, the Ten Commandments monument still implied that the city was endorsing religion and ordered FOE's land be returned to the city and the monument removed.

• *ACLU of Kentucky v. Grayson County*, 2002 WL 1558688 (W.D. Ky. 2002).
A Grayson County courthouse display called "Foundations of American Law and Government Display" is composed of a variety of documents including the Ten Commandments, the Magna Carta, the Mayflower Compact, The Star Spangled Banner, among others. But the ACLU filed a lawsuit to challenge the display because the Ten Commandments were included. The court censored the use of the Ten Commandments in the display.

• *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004), vacated, reh'g granted 2004 U.S. App. LEXIS 6636.
The ACLU and a member who resided in Plattsmouth, Nebraska filed suit, complaining that the city's Ten Commandment display violated the Establishment Clause. The display was donated to the city in 1965 by the Fraternal Order of the Eagles, which erected many such displays in the 1950s and 1960s in an effort to combat juvenile delinquency. The court struck the display down, determining that it promoted religion.

• *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002).
In 2000, Kentucky Governor Paul E. Patton signed a resolution that permitted public school teachers to display the Ten Commandments in their classroom and also authorized the relocation of the Ten Commandments monument from the

Fraternal Order of the Eagles on Capitol grounds as part of a display that would showcase Kentucky's Biblical historical heritage. Citizens protested the proposed display and filed a lawsuit to challenge the resolution, and the court determined that the proposal was unconstitutional.

- *Baker v. Adam County/Ohio Valley Sch. Bd.*, 2004 U.S. App. LEXIS 481 (6th Cir. 2004) (not recommended for full-text publication).
  A school board erected Ten Commandment monuments that a county ministerial association paid for, and a suit was filed, challenging the constitutionality of the monuments. The school board added other historical documents relating to the development of American law and government to the displays, but the lawsuit continued anyway. The court ordered that the monuments be removed.

- *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2001).
  Elkhart's Municipal Building had a monument of the Ten Commandments, and residents filed suit in objection to the display, claiming it violated the Establishment Clause. The Seventh Circuit struck down the display.

- *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003).
  The ACLU filed suit to challenge Ten Commandments displays from three Kentucky county courthouses, seeking to have the displays removed, and the Sixth Circuit ordered the displays be eradicated from the courthouse.

- *ACLU of Ohio v. Ashbrook*, 211 F. Supp. 2d 873 (N.D. Ohio 2002).
  The ACLU brought a lawsuit seeking the removal of the Ten Commandments from a state courtroom display, which features the Ten Commandments along with the Bill of Rights, and the court struck down the display.

- *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757 (E.D. Tenn. 2002).
  The ACLU filed suit challenging the Ten Commandments displays in county courthouses.

- *ACLU of Tenn. v. Rutherford County*, 209 F. Supp. 2d 799 (M.D. Tenn. 2002).
  The ACLU sued Rutherford County to challenge the Ten Commandments display in the county courthouse lobby.

- *Chambers v. City of Frederick*, 292 F. Supp. 2d 766 (N.D. Md. 2003)(mem.).
  Chambers, a Frederick resident, objected to the Ten Commandment display in the city park that the Fraternal Order of the Eagles (FOE) had donated in 1958. In response, the city sold that portion of the park to the FOE, and the FOE covenanted to care for the area. Chambers still not satisfied, filed a lawsuit.

- *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999).
  A school's baseball booster club raised funds by selling ads on the baseball field fence for $400. Mr. DiLoreto, CEO of Yale Engineering, bought an ad, which he sought to use to display the Ten Commandments. But the sign was rejected and

Mr. DiLoreto's money was returned. A lawsuit was filed to protect Mr. DiLoreto from viewpoint discrimination.

• *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000).
A Harlan student's parents filed suit to challenge the public schools' practice posting the Ten Commandments in classrooms. In response to the lawsuit, the school district added other historical documents to the displays, but the lawsuit continued.

• *Freethought Soc'y v. Chester County*, 334 F.3d 247 (3rd Cir. 2003).
A lawsuit was filed to challenge the Ten Commandments display on the county courthouse façade, but the court allowed the display to remain.

• *Grassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2004).
Alabama Supreme Court Chief Justice Roy S. Moore installed a Ten Commandments monument in the state's judicial building, and a lawsuit was filed to challenge the display and the monument was forcibly removed.

• *Stone v. Graham*, 449 U.S. 39 (1980)(per curiam).
A lawsuit challenged a statute that required the posting of the Ten Commandments in classrooms, with a disclaimer relating to the secular use of the Ten Commandments in Western Civilization.

• *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002).
The Summum Church asked the city of Ogden to replace a Ten Commandments display that the Fraternal Order of the Eagles had donated to the city with a monument to the Summum religion. The church filed a lawsuit.

• *Turner v. Habersham County*, 290 F. Supp. 2d 1362 (2003).
Citizens challenged the display of the Ten Commandments at the Habersham County Courthouse.

• *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003).
A Texan challenged the Ten Commandments display on state capitol grounds in Austin, but the court upheld the display.

•*Young v. County of Charleston*, 1999 WL 33530383 (S.C. Com. Pl. 1999).
A court struck down a city courthouse Ten Commandment display as a violation of the Establishment Clause.

• Nicole Buzzard, *A Youth with a Mission: A Santiago High School Junior seeks to post the Ten Commandments at Corona-Norco Campuses*, The Press Enterprise Co. (Riverside, CA), June 30, 2004, B01.
High school junior Jason Farr wanted to post Ten Commandments fliers in his high school, Santiago High School, and other schools in his district. After posting the Ten Commandments fliers, he was threatened with a five-day suspension.

Additionally, Farr has been informed that the Bible is not suitable material for the silent reading period, despite the fact that it fulfills page and genre requirements.

- Brad Hern, *Coalition Wants to put Monument on Ballot; Boise City Attorneys will Determine whether Voter Initiative is Valid,* The Idaho Statesman, June 14, 2004, at Local, p. 1.
  Supporters of Ten Commandments displays in Treasure Valley are working to overturn the removal of the Ten Commandments display by the city council.

- Kristen Wyatt, *Counties Continue Religious Postings*, The Associated Press, July 8, 2004, North Georgia, BI.
  Two Georgia counties have added Ten Commandment displays to their courthouses, and legal challenges may likely follow.

- *From Manhattan, Kansas:*
  The ACLU and the Americans United for Separation of Church and State challenged a Ten Commandments monument at the city hall in Manhattan. After the lawsuit was filed, the City Commission decided to settle and remove the display.

- *From Everett, Washington:*
  The Americans United for Separation of Church and State filed suit challenging a Ten Commandments Display donated by the Fraternal Order of Eagles.

- Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Text Violate the Establishment Clause*, 39 S. Tex. L. Rev. 101 (1997).

**OTHER**

- *Marsh v. Chambers*, 463 U.S. 783 (1983).
  A member of the Nebraska legislature brought suit challenging the longstanding practice of employing a chaplain to pray before the opening of each legislative session, claiming the practice was unconstitutional.

- *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.C. Cal. 2003).
  An agnostic family sued San Diego and the Boy Scouts because the city had leased some public parkland to the Boy Scouts. They claimed the lease violated the Establishment Clause.

- *HEB Ministries v. Texas Higher Educ. Coordinating Bd.*, 114 S.W.3d 617 (Ct. App., Austin 2003).
  Texas passed a law forcing all private postsecondary educational institutions in the state to get accreditation from a state agency. Tyndale Seminary was fined $173,000 by the state for using the word "seminary" and issuing theological degrees without government approval. A suit was filed to prohibit the

government's attempt to control religious training, but the Texas Court of Appeals in Austin upheld the law.

• *Doe v. Vill. of Crestwood*, 917 F.2d 1476 (7th Cir. 1990).
A long-standing tradition of the Village of Crestwood's "A Touch of Italy" festival was to include an Italian Mass, but a citizen filed suit challenging the mass tradition.

• *Freedom From Religion Found. v. McCallum*, 324 F.3d 880 (7th Cir. 2003).
The Freedom from Religion Foundation filed a lawsuit to prevent correctional authorities from funding Faith Works because the halfway house incorporates Christianity into its program.

• *Freedom From Religion Found. v. Romer*, 921 P.2d 84 (Colo. Ct. App. 1996).
The Freedom from Religion Foundation sued Denver City Council members and Arapaho County officials after the Pope visited Denver for World Youth Day in 1993. The lawsuit asserted that using a state park for religious services, temporarily closing the park to the public and use of state funds to facilitate the visit violated the First and Fourteenth Amendments.

• *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145 (4th Cir. 1991).
A legal organization and some citizens challenged a judge's practice of opening his session with a prayer, seeking to forbid the judge from continuing the practice.

• Bill McAllister, *Postal Service Ends Christ Camp Stamp Series*, Washington Post, Nov. 19, 1994, at F1.
The Post Office replaced its Madonna and Child stamp in the holiday stamp collection with an angel stamp after using the Madonna and Child for 28 years. The Post Office resumed the stamp after there was a public outcry.

• *From Madison, Wisconsin:*
The Freedom from Religion Foundation challenged the constitutionality of a faith-based program working to rehabilitate and treat prisoners who have drug and alcohol addictions. The program was highly successful and President Bush even visited it to stress excellence and success of the program. Although the faith-based program was merely an option, and no prisoner had to choose to attend the program, the Freedom from Religion Foundation challenged the program because of its disdain that the program was an option for prisoners and that state funding was used by the program, claiming a "separation of church and state" violation.

• *Grace Community Church, et al. v. City of McKinney, et al.*,
Civil Action No. 4:04CV251
A new church starting in McKinney, Texas began meeting on Sundays in the pastor's home with a few couples. The City took drastic action to shut down a church meeting in the home. The City has no problem with people meeting in their homes for football watch parties, birthday parties or even commercial gatherings to sell Tupperware. However, the City prohibits a church meeting in a home unless the home sits on at least two acres.

# Written Statement of the Honorable Roy S. Moore before the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights
# June 8, 2004

## I. Chronology of Events

In November 1992, I was appointed circuit judge in Etowah County, Alabama. At that time, I continued the long-standing practice in Etowah County of opening courtroom sessions with prayer. I also placed a woodcarving containing the Ten Commandments on the wall behind my bench in the courtroom. In early 1993, the American Civil Liberties Union of Alabama expressed public concern about these acknowledgments of God, and in 1995 the ACLU represented the Alabama Freethought Society, which filed a taxpayer lawsuit in federal district court against me, complaining about both the prayers and the posting of the Commandments. On July 7, 1995, the federal district court dismissed the suit for lack of standing. In a declaratory judgment action filed by then-Governor Fob James on April 21, 1995, the ACLU cross-claimed against me, demanding that the State put a stop to my courtroom prayers and that it make me remove the Ten Commandments from my courtroom. On November 22, 1996, an Alabama circuit court ordered me to cease the practice of prayer in my courtroom. On February 10, 1997, the same circuit court ruled that the Ten Commandments plaque displayed in my courtroom violated the First Amendment's Establishment Clause and ordered me to remove it within 10 days unless I surrounded it with other historical objects. I refused to obey either of the circuit court's orders and the case was appealed to the Alabama Supreme Court. The Alabama Supreme Court, on January 23, 1998, ruled that there was no justiciable controversy and dismissed the case, leaving me free to continue the practice of prayer in the courtroom and allowing the Ten Commandments plaque to remain posted on the courtroom wall.

In 2000, I ran for the position of Chief Justice of the Alabama Supreme Court, pledging to restore the moral foundation of law to our legal system. I was elected and was sworn in as Chief Justice on January 15, 2001, promising that "God's law will be publicly acknowledged in our court." On July 31, 2001, after months of preparation, I installed a granite monument depicting the Ten Commandments in the rotunda of the Alabama Judicial Building. On October 30, 2001, the ACLU, Americans United for Separation of Church and State, and the Southern Poverty Law Center filed lawsuits on behalf of three lawyers against me in my official capacity as Chief Justice, demanding that I remove the monument from public display. After a weeklong trial, on November 18, 2002, a federal district court issued an opinion ordering me to remove the monument from public view. The district court specifically found that the monument "acknowledge[ed] the Judeo-Christian God as the moral foundation of our laws," although they conceded that "the Ten Commandments were a foundation of American law [and] that America's founders looked to and relied on the Ten Commandments as a source of absolute moral standards." *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1293, 1300 (M.D. Ala. 2002). However, the district court explicitly refused to define the term "religion" under the Establishment Clause of the First Amendment, saying that it would be "unwise, and even dangerous, to put forth, as a matter of law, *one* definition of religion under the First Amendment." *Id.* at 1313 n.5 (emphasis in original). Despite being unable to define the term "religion," the district court in effect ruled that I had established religion in violation of the First Amendment by installing the Ten Commandments monument as an acknowledgment of God.

I appealed the district court's ruling, but on July 1, 2003, the 11th Circuit Court of Appeals affirmed the federal district court's decision. On August 5, 2003, before I had filed an appeal with the U.S. Supreme Court, the federal district court ordered me to remove the monument from the rotunda of the judicial building within 15 days or face the possibility of fines against the State of Alabama. On August 14, 2003, before the federal district court's deadline had lapsed, the same lawyers who filed suit against me to have the monument removed filed a complaint with the Alabama Judicial Inquiry Commission, asking that I be removed from the office of Chief Justice for "defying" a federal court order. The August 20th deadline passed without the monument being removed, and the next day the associate justices of the Alabama Supreme Court voted to order the building manager to move the monument from public view. The monument was removed from the rotunda on August 27, 2003, and it is in a locked closet in the judicial building to this day. On November 3, 2003, the United States Supreme Court denied certiorari in my case, refusing to answer the vital questions it raised concerning the right of a public official to acknowledge God.

On August 22, 2003, the Judicial Inquiry Commission charged me with six violations of the judicial canons of ethics for my refusal to obey the federal district court's order to remove the monument. On November 14, 2003, after a one-day trial, the Alabama Court of the Judiciary ordered that I be removed from the office of Chief Justice, but refused to even address the arguments I raised explaining why my actions were completely constitutional. I appealed the decision of the Court of the Judiciary, and a special Supreme Court was appointed through an unprecedented and improper process. The Special Supreme Court affirmed the decision of the Court of the Judiciary, and as a result I have been removed from the position to which I was elected by the people of Alabama because I chose to acknowledge God through a display of the Ten Commandments. Presently, I am preparing to file a petition for certiorari to the U.S. Supreme Court concerning my removal from office.

**II. Why Acknowledgements of God are Constitutional**

The United States Supreme Court and the lower federal courts have distorted First Amendment law as it relates to religion by applying a myriad of complex, but ultimately incoherent, judicially-fabricated tests in this area, rather than following the text of the Establishment Clause. The text of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." Acknowledgments of God such as the monument I installed in the rotunda of the Alabama Judicial Building do not violate the First Amendment because they are not "laws," they do not concern "establishments," and they are not "religion" as those terms were understood at the time the Bill of Rights was adopted. Neither my monument, nor any other Ten Commandments display that I am aware of, commands or prohibits with the force of law any action by any person; thus, under any reasonable definition of the term "law," such displays cannot be said to violate the Establishment Clause. An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (*reprint* 1998) (1891). Ten Commandments displays and similar acknowledgments of God do not in any fashion represent the setting up of a state-sponsored church, nor does it in any way lend government aid to one faith over another.

Most importantly, the source of most of the confusion in this area of the law is the incorrect belief that acknowledgments of God are equivalent to "religion" under the First

Amendment. A prohibition on government-sponsored religion does not simultaneously forbid acknowledgments of God by public officials. An acknowledgment of God recognizes God's existence, place, and influence in our society. In contrast, a religion, as understood by the founding generation, dictates both the duties we owe to our Creator and the manner in which we discharge, or carry out, those duties. For example, a religion dictates not only **that** a person is to worship God, but also **how** he or she is to do so. Many acknowledgments of God, such as "under God" in the Pledge of Allegiance, the motto "In God We Trust," or taking an oath "so help me God," do not dictate either duties we owe to God or the manner in which we are to discharge those duties. Other acknowledgments of God, such as a Ten Commandments display or prayer by a public official, may inform as to certain duties owed to the Creator, but they do not dictate the manner in which a person is to carry out those duties. Thus, acknowledgments of God do not coerce belief or behavior, whereas, a particular religion, such as Protestantism, Catholicism, or Judaism, may require a person to believe certain tenets and act or refrain from acting in certain ways.

Just as the Supreme Court has ceased over time to apply the actual words of the First Amendment in Establishment Clause cases, our society has lost this distinction concerning religion and now regularly equates any mention of God with religion, and thus indiscriminately assumes that any mention of God in the public square is unconstitutional. The importance of this distinction cannot be overstated because acknowledgments of God have been a part of our history from its inception—from the Declaration of Independence's reminder that "we are endowed by our Creator with certain unalienable rights," to the countless Thanksgiving proclamations given by Presidents of the United States, to our national motto—and they must remain a part of the fabric of our country if we are to hold onto the moral foundation of our legal system.

**III. Why I Could Not Follow The Federal Court Order**

My critics have said that it is one thing to disagree with the current judicial position on the Establishment Clause—and anyone who is familiar with that jurisprudence over the last 40 years will concede it is unclear at best and a model of incoherence at worst—but it is entirely something else to disobey a federal court order, what some mistakenly call "the rule of law." But, if Establishment Clause jurisprudence is in such disarray, what "rule" was I defying? Indeed, in my case the Eleventh Circuit Court of Appeals asserted that "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts." *Glassroth v. Moore*, 335 F.3d 1282, 1288 (11th Cir. 2003). If, by "defying the rule of law" my critics mean that I have defied federal judges, then they are equating "the law" with the pronouncements of those judges. That is not our system. It appears that, in addition to forgetting that acknowledgments of God hold a vital and plainly constitutional place in our public discourse, we have also forgotten the basic concept that the legislature **makes** the law and the judiciary **interprets** the law. The two are separate, distinct functions.

Yet, when the federal district court ordered me to remove the Ten Commandments monument from the rotunda of the Alabama judicial building, it did so based upon an opinion that did not just misinterpret the law—it failed to interpret the law at all. As I hopefully have made clear already, acknowledgments of God such as a Ten Commandments display do not violate the Establishment Clause of the First Amendment, properly interpreted. But the federal district court declined even to interpret the law by refusing to define the word "religion" in the First Amendment. In doing so, the federal district court neglected its duty to interpret the law,

but still found that I had violated the Establishment Clause by installing a monument. A judge's ruling is an **opinion** on the law, not the law itself: the opinion carries the weight of the law behind it only so long as it remains faithful to the text of the law. When a judge blatantly misinterprets the law or fails to interpret the law at all, his opinion is no longer clothed in the authority of the law. If this was not the case, unelected federal judges could replace the law on a whim through their own opinions. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1856) (Curtis, J., dissenting). However, judges swear an oath to the **Constitution**, not to themselves or another person, precisely to prevent this very possibility. *See* U.S. Const. Art. VII.

As an officer of the courts, I, like the federal district judge, swore an oath to the Constitution. All judges have a duty to faithfully interpret the law of the Constitution. Furthermore, I also solemnly swore to "faithfully and honestly discharge the duties of the office" of Chief Justice of Alabama. The Chief Justice is the chief administrator of the Alabama judicial system, which carries with it an additional responsibility "[t]o take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state." Section 12-2-30(b)(7), Ala. Code 1975. The Alabama Constitution states that "the people . . . in order to establish justice . . . [and] invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama." Ala. Const. 1901, pmbl. Under these provisions, it was part of my duty as Chief Justice to acknowledge God as the foundation of our justice system.

By ordering me to remove the monument, the federal district court in effect commanded me to violate the oath I swore as Chief Justice of Alabama. The federal district court had no authority to do this because the responsibility to administer the justice system of the State of Alabama is a power clearly not delegated to the federal government under the U.S. Constitution, and, therefore, under the 10th Amendment, is "reserved to the States . . . ."

In short, I have been accused of refusing to follow the "rule of law," even though (1) the monument did not violate the only proper rule of law in this case, i.e., the Constitution; (2) the federal district court that issued the so-called rule of law refused to interpret that document; and (3) the district court's ordering me to remove the monument constituted an unconstitutional command that would have required me to violate my oath of office and my conscience. No "constitutional crisis" occurred as a result of my actions. The authority of the federal court to remove a monument should properly have been addressed to a "ministerial officer" such as the building manager, and not to a public official sworn by oath to uphold the Constitution. I submit that my actions, far from undermining "the rule of law," in fact represented an attempt to uphold the true rule of law, for no just law, independent of man's capricious whims, can exist without the acknowledgment of God as the **foundation** of that law.

**IV. The Road to Recovery: The Constitutional Restoration Act**

Given the disarray of Establishment Clause jurisprudence in the federal courts and their refusal to follow the words of the First Amendment, the only remedy is for Congress to assume its responsible role of regulating the jurisdiction of those courts. Under Article III of the Constitution, Congress clearly possesses the power to regulate the jurisdiction of the federal courts in this area of the law, and the Constitutional Restoration Act proposes just that. *See* U.S. Const. Art. III, sec. 2. The federal courts have no authority to restrict acknowledgments of God, and Congress has the duty to return the courts to a proper understanding of public expressions of God.

I close with the wise words of President Ronald Reagan, spoken to the Alabama Legislature on March 15, 1982:

> [S]tanding up for America also means standing up for the God Who has so blessed our land. I believe this country hungers for a spiritual revival. I believe it longs to see traditional values reflected in public policy again. To those who cite the first amendment as reason for excluding God from more and more of our institutions and everyday life, may I just say: The first amendment of the Constitution was not written to protect the people of this country from religious values; it was written to protect religious values from government tyranny.

TESTIMONY OF
DR. VINCENT PHILLIP MUÑOZ

THE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS & PROPERTY RIGHTS

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

"The Supreme Court's Responsibility for
Hostility Toward Religious Expression in the Public Square"

8 June 2004
Washington, D.C.

* * * * *

MR. CHAIRMAN and members of the subcommittee: Thank you for inviting me to share my views. I am the *Civitas* Fellow of Religion and Public Life at the American Enterprise Institute and an Assistant Professor of Political Science at North Carolina State University.

If I can communicate only one point in my testimony today it is this: The United States Supreme Court remains primarily responsible for the continued legal hostility toward religious expression in the public square. Stated simply, the Supreme Court has interpreted the Establishment Clause in a manner that encourages and sometimes demands hostility toward religion.

Two Establishment Clause doctrines, in particular, lead to hostility toward religion: The "endorsement" test and the "coercion" test.

The "endorsement" test, which was invented by Justice Sandra Day O'Connor in the 1984 case *Lynch v. Donnelly*, prohibits state actors from endorsing religion. It purportedly keeps government religiously neutral. In practice, however, "no endorsement" quickly becomes outright hostility, especially in the context of public schools. Under this rule, activities that a child might perceive to favor religion must be prohibited to avoid the appearance of governmental endorsement.

The quintessential example of how the "endorsement" test purges religion from public schools occurred in the 1985 case *Wallace v. Jaffree*. The Supreme Court used the test to strike down an Alabama law that directed the public school day to begin with a moment of silence for voluntary prayer or meditation. Justice O'Connor claimed that to set aside one minute for children to pray silently endorses religion, and thus, under her interpretation, violates the Constitution.

In 1989 the Supreme Court used the "endorsement" test to require the removal of a privately funded nativity scene in front of a courthouse in Allegheny County, Pennsylvania. Perhaps most notoriously, the 9th Circuit Court of Appeals employed the "endorsement" test to prohibit teacher-led recitations of the Pledge of Allegiance in public schools. The words "under God," the 9th Circuit explained, endorse a particular religious concept, namely monotheism.

The 9th Circuit's decision has come under heavy criticism, including criticism from the Senate. But the 9th Circuit only followed the example set by the Supreme Court. "Under God" endorses the civic faith Americans have adopted since the signing of the Declaration of Independence. But this expression, if we use Justice O'Connor's standard, violates the Constitution.

The second leading test used by the Supreme Court for Establishment Clause jurisprudence is the "coercion" test. Invented by Justice Kennedy in the 1992 case *Lee v. Weisman*, the "coercion" test sounds reasonable—no one believes that the state legitimately may coerce religious practice—but, as applied by the Court, it too drives religion out of the public square.

In *Lee v. Weisman*, the Court eliminated non-denominational invocations and benedictions at public school graduations. According to Justice Kennedy, to ask public school children to stand respectfully while others pray "psychologically coerces" religious practice. In 2000, the Court prohibited the Texas tradition of non-denominational prayer before high school football games, because, it said, some fans might feel like "outsiders." Thus interpreted, the "coercion" test secures "the right not to feel uncomfortable" because of others publicly expressing their religious beliefs.

It's common sense to say that the government may not force a student to pledge allegiance to the flag or to recite a prayer. It's something altogether different to say that because some feel like outsiders, others may not pray. Tolerance should be a two-way street.

Like the "endorsement" test, the logic of the "coercion" test calls for the curtailment of public expressions of religious sentiment. It's no coincidence that the 9th Circuit also cited Justice Kennedy's psychological coercion reasoning when it struck down the Pledge of Allegiance.

While the cases I have mentioned are significant in and of themselves, their impact extends far beyond the specific parties involved. What constitutes an impermissible "endorsement" or "psychological coercion" is inherently indistinct. The law's vagueness makes state acknowledgement of religious sentiment suspect. It enables special interest litigators, who are professionally hostile toward religion, to file lawsuits to challenge almost any state action that accommodates religion. The chilling effect of such litigation and the mere threat it is considerable.

Imagine yourself as a city council member or a high school principal: it's easier to remove the Ten Commandments from the public park or to silence the school valedictorian who wishes to speak about religious faith, than it is to undertake a costly legal battle against ACLU. Fearful local officials and public school administrators have the incentive to eliminate the public acknowledgement of religious sentiment in order to avoid costly litigation. In this way, the Supreme Court has armed anti-religious activists to impose their vision of the secular state through legal threats and litigious intimidation. The result is not only "the naked public square," but the trampling of religious individuals' constitutional rights to religious free exercise and freedom of expression.

The Constitution's text prohibits laws respecting an establishment of religion or prohibiting the free exercise thereof. It says nothing about government "endorsement of religion." Justice O'Connor effectively has replaced the text and original meaning of the First Amendment with her own words and ideas. Justice Kennedy's "psychological coercion" test is also far off the mark. The Founders understood religious "coercion" to mean being fined or imprisoned on account of one's religion; not feeling uncomfortable when other people mention God.

The modern Court has lost sight of the fact that framers of the First Amendment meant to protect religious freedom, not to banish religion from the public square. The free exercise of religious is the primary end of the First Amendment; no-establishment is a means toward achieving that end.

By prohibiting religious establishment, the Founders sought to end practices like state officials appointing bishops, limiting public office to members of the established church, and the licensing and regulation of dissenting religious ministers. They did not mean to forbid the public acknowledgement of God or even non-sectarian endorsement of religion. They certainly did not intend to constitutionalize doctrines like the "endorsement" test and the "coercion" test. Until these doctrines are overturned, legal hostility to religion in the public square will continue.

Via fax, e-mail, and hand delivery

June 14, 2004

The Honorable John Cornyn
Chairman, Subcommittee on the Constitution, Civil Rights
and Property Rights
Senate Committee on the Judiciary
517 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Russell D. Feingold
Ranking Member, Subcommittee on the Constitution, Civil Rights
And Property Rights
Senate Committee on the Judiciary
506 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Cornyn and Feingold:

I am writing with respect to the hearing held by the Subcommittee on June 8, 2004, concerning questions raised at the hearing about the position of People For the American Way Foundation on the Equal Access Act and religious liberty. As Rev. Brent Walker testified at the hearing, People For has not been on the "other side" of the Equal Access Act, and has been "very good at helping us enforce the parameters" of the Act. For example, People For was one of the principal drafters of Religion in the Public Schools: A Joint Statement of Current Law, a 1995 joint publication by more than 30 religious and civil liberties groups that has been widely credited with helping clarify and protect religious liberty rights in public schools. Section 13 of the joint statement provides specifically that "student religious clubs in secondary schools must be permitted to meet and to have equal access" under the terms of the Act, and that the "Act's constitutionality has been upheld by the Supreme Court." We have also been involved in litigation seeking to enforce the Act. In Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990), which was mentioned by Senator Cornyn, we did argue for a more narrow interpretation of the Act than that ultimately adopted by the Court, but we did not argue that it was unconstitutional.

People For has also vigorously argued for the protection of religious free exercise and free expression, including in the

2000 M Street, NW ▸ Suite 400 ▸ Washington, DC 20036
Telephone 202.467.4999 ▸ Fax 202.293.2672 ▸ E-mail pfaw@pfaw.org ▸ Web site http://www.pfaw.org

public square. For example, we filed an amicus curiae brief in Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993), in which we argued that it was unconstitutional to deny equal access to a religious group to use a public high school auditorium on weekday evenings to show films that addressed family issues from a religious perspective. People For the American Way, our affiliated organization, strongly supported the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, and we have defended both laws in a number of cases.

People For has also vigorously advocated for the principle that, for the sake of religious liberty, government should not promote or endorse religion. That was the basis for our amicus curiae brief in support of the position adopted by the Court in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000), and for our amicus brief in Good News Club v. Milford Central School, 533 U.S. 98 (2001), where our position did not prevail. With all due respect to those who argued to the contrary at the hearing, the fact that the "endorsement" principle is not explicitly in the First Amendment and that justices sometimes differ in its interpretation is no more relevant than the fact that accepted standards such as "time, place and manner" are not explicitly in the First Amendment and that justices sometimes differ in their interpretation of those as well. In Good News, it should be noted, every Supreme Court Justice other than Justice Scalia considered it important whether the school district could reasonably be perceived as endorsing or promoting religion.

Even more important, avoiding government promotion or endorsement of religion should not be viewed as hostility towards religion. As Rev. Walker and Prof. Rogers testified at the hearing, that principle protects religious liberty, especially for religious minorities, by ensuring that the government does not place its power behind a particular religious view and make those who do not share it feel like outsiders in their own community. Precisely that problem occurred when the Manatee County school board led or authorized sectarian prayer at its meetings, as Steven Rosenauer testified at the hearing. As Mr. Rosenauer explained, it is crucial that the federal courts continue to protect that aspect of religious liberty in America.

Please let me know if you would like copies of any of the materials referred to in this letter. In light of the fact that People For's position on these issues was specifically mentioned at the hearing, we respectfully request that this letter be included in the record of last Tuesday's hearing. Thank you very much.

Sincerely,

Elliot M. Mincberg
Vice-President and Legal Director

TESTIMONY

OF

MELISSA ROGERS,

VISITING PROFESSOR OF RELIGION AND PUBLIC POLICY

WAKE FOREST UNIVERSITY DIVINITY SCHOOL

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

"BEYOND THE PLEDGE OF ALLEGIANCE:

HOSTILITY TO RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE"

TUESDAY, JUNE 8, 2004

**I. Introduction**

Thank you, Mr. Chairman and Members of the Subcommittee, for this opportunity to speak with you about religious expression in the public square.[1] I am Melissa Rogers, and I currently serve as a visiting professor of religion and public policy at Wake Forest University Divinity School.[2] I formerly served as the founding executive director of the Pew Forum on Religion and Public Life, an organization supported by The Pew Charitable Trusts that is dedicated to exploring the way in which religion shapes American institutions and ideas.[3] During my service at the Pew Forum, I had the rewarding opportunity to organize many educational events, including events focusing on accommodation of religious practices in the private workplace[4] and teaching about religion in our nation's public schools.[5] I also brought together some of the nation's top church-state scholars to produce a joint statement describing the state of the law on school vouchers in the wake of the U.S. Supreme Court's 2002 decision on this issue, *Zelman v. Simmons-Harris*.[6]

Previous to my time with the Pew Forum, I served as general counsel of the Baptist Joint Committee on Public Affairs.[7] In that capacity, I had the great privilege of helping to lead a remarkable coalition that included Methodists, Mormons and Muslims, as well as organizations ranging from the American Civil Liberties Union and People for the American Way to Chuck Colson's Prison Fellowship and the National Association of Evangelicals. This coalition urged Congress to pass the Religious Land Use and Institutionalized Persons Act (RLUIPA) -- a bill that was signed into law in 2000.[8] RLUIPA provides heighten protection for the fundamental right to exercise religion in two ways. First, it creates a stronger legal shield for houses of worship and other religious institutions from zoning and land use regulations that substantially burden religious exercise without a compelling reason. Second, it allows prisoners greater opportunities to practice their faith in ways that do not undermine prison security and order. Many of the members of this Committee were critical to the passage of that Act, particularly Senators Hatch and Kennedy, who served as the lead co-sponsors of the Senate bill.

During my service at the Baptist Joint Committee, I also contributed to *amicus curiae* briefs in favor of the prevailing parties in *Santa Fe Indep. Sch. Dist. v. Doe*[9] and *Good*

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[1] I understand that the Subcommittee allows witnesses to supplement their testimony, including footnoted material, after the hearing. I would like to reserve my right to take advantage of that opportunity.
[2] My faculty biography is posted at http://www.wfu.edu/divinity/faculty-rogers.html.
[3] For more information about the Pew Forum on Religion and Public Life, visit www. pewforum.org.
[4] See transcript for conference entitled, *Reconciling Obligations: Accommodating Religious Practice on the Job*, http://pewforum.org/events/index.php?EventID=27.
[5] See transcript for conference jointly sponsored by the Pew Forum and the Freedom Forum First Amendment Center entitled, *Teaching About Religion: Where Do we Go From Here?* http://pewforum.org/events/index.php?EventID=48
[6] *See School Vouchers: Settled Questions, Continuing Disputes,* http://pewforum.org/issues/files/VoucherPackage.pdf
[7] For more information about the Baptist Joint Committee on Public Affairs, visit www.bjcpa.org.
[8] 42 U.S.C. Section 2000cc-1 *et. seq.* (2004).
[9] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000).

*News Club v. Milford Central School Dist.*,[10] among other cases heard by the U.S. Supreme Court. Further, I was honored to have the opportunity to work on many public education projects about the law of religious freedom, including statements on religious expression in the public schools,[11] religious expression and exercise in the federal workplace[12] and religious organizations' delivery of government-funded social services.[13]

Finally, I should note that I am a Baptist and a youth Sunday school teacher. I speak today not for any of the institutions with which I have been or am now affiliated, but as an attorney, a Christian and someone who has been deeply involved in issues at the intersection of religion and public affairs for many years.

I believe religion can and should play a vital role in American public life. The rights to free speech and the free exercise of religion are fundamental to American citizenship and human dignity. These rights allow religious people to live in fidelity to their faith and their nation, a treasure many in this world do not enjoy. The Constitution wisely recognizes that people cannot be expected to limit their religious expression to their homes or places of worship -- faith informs many Americans' daily lives and decision-making on public as well as private matters. Indeed, our national dialogue would be impoverished and distorted if religion were to be excluded from the public square, and our work together as a nation would be less just, humble and kind. These rights have helped to create an American landscape in which religious freedom and religion are strong.

I also believe that the constitutional prohibition on governmental establishment of religion plays an equally important role in protecting religious freedom. The Establishment Clause of the First Amendment[14] prohibits the government from promoting religion or sponsoring religious activities and exercises.[15] This prohibition not only protects the right of all Americans to choose in matters of faith, it strengthens the American public square and religion in other ways. By insisting that the government stay neutral between religion and religion, it creates confidence among those of minority faiths that they will have equal rights as citizens. This safeguards our nation's stability

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[10] Good News Club v. Milford Central Sch., 533 U.S. 98 (2001).

[11] *Religion in the Public Schools: A Joint Statement of Current Law*, which may be found at http://archive.aclu.org/issues/religion/relig7.html. President Clinton noted that his administration borrowed from this statement to create a similar statement on this subject entitled, *Religious Expression in Public Schools*, which was released by The White House on May 30, 1998, and sent to every school district in the nation. This statement on religious expression may be found at www.ed.gov/Speeches/08-1995/religion.html.

[12] *See Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, issued by The White House on August 14, 1997, which can be found at http://www.clsnet.org/clrfPages/pubs/pubs_guideFed.php

[13] *See In Good Faith: A Dialogue on Government-Funding on Faith-based Social Services*, which may be found at http://pewforum.org/publications/reports/ingoodfaith.pdf

[14] "Congress shall make no law respecting an establishment of religion . . . ." Amendment I to the U.S. Const.

[15] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 429-30 (1962); Abingdon Township v. Schempp, 374 U.S. 203, 225 (1963); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); County of Allegheny v. ACLU, 492 U.S. 573, 590-91 (1989).

amidst growing religious diversity. By securing governmental neutrality between religion and non-religion, the Establishment Clause builds solidarity among all Americans, regardless of their faith or lack thereof. By ensuring that religious, rather than governmental, authorities define religion and shape its course, the prohibition on governmental establishment of religion, no less than the rights to free exercise and free speech, protects religion's vitality and integrity.

In its decisions regarding religious expression in the public square, the U.S. Supreme Court has struck a wise balance by protecting the right of citizens and religious groups to promote their faith and prohibiting the government from doing so. When the Court has found certain religious expression to be unconstitutional, I believe the evidence demonstrates that it has been motivated by a desire to protect choices in matters of faith from government's coercive influence, not by hostility toward religion or religious expression.

Moreover, it has been my general experience that, on those occasions when other governmental bodies over-interpret the law prohibiting governmental establishment of religion, those misinterpretations are due to ignorance of or confusion about this complex area of law rather than to bad intent. I also should note that I have encountered situations in which governmental bodies under-interpret the Establishment Clause, which results in another kind of serious deprivation. Both kinds of violations should be viewed as matters that are equally troubling. Both kinds of violations should be swiftly rectified through education about and enforcement of the law.

I do not believe, therefore, that there is persistent or frequent governmental hostility toward religious expression in the public square. Indeed, it strikes me that religious freedom is something America usually gets remarkably right.

My testimony is divided into two parts. The first part explores the claim that the decisions of the U.S. Supreme Court are hostile to religious expression in the public square. The second part explores the claim that other governmental bodies have taken actions that are hostile to faith and to public religious expression.

## II. Do the Decisions of the U.S. Supreme Court Reflect Hostility to Religious Expression in the Public Square?

Do the decisions of the U.S. Supreme Court reflect hostility to religious expression in the public square? My answer to this question is "no" for at least two reasons. First, the Court has ruled in favor of protecting religious expression in public places many times. Second, when the Court has found that religious expression is unconstitutional because it constitutes governmental promotion or sponsorship of religion, its reasoning has not reflected or been rooted in hostility toward religious expression. The following two sections expand on these issues.

### A. The Public Role Religion May Play Under the U.S. Constitution

The U.S. Supreme Court has said: "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause [of the First Amendment] forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses [of the First Amendment] protect."[16] This reference to "private speech" is not limited to speech "in private," of course,[17] but describes religious expression attributable to private individuals and groups rather than to the government. Thus, under the First Amendment, the government has two principal responsibilities regarding religious expression: it must not endorse religion itself, but it must protect the right of citizens and religious groups to do so.

Using this reasoning, the Court has made it clear that there is a role for public religious expression on government property, in policymaking and politics. For example, while public school teachers cannot lead their classes in prayers or Bible readings, the Court's decisions leave room for public school students to say grace over their lunches and to read their Bibles at school.[18] As the Court has said: "[N]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time, before, during or after the schoolday."[19] It is widely agreed that these decisions also allow public school students many other opportunities to express and exercise their faith, including the right to "express their religious beliefs in the form of reports, homework and artwork" and to "distribute religious literature to their schoolmates, subject to those reasonable time, place and manner or other constitutionally acceptable restrictions imposed on the distribution of all non-school literature."[20]

It also should be noted that, while these rulings prohibit public schools from engaging in devotional teaching of religion, they allow public schools to teach about religion in an academic way. As the Court said decades ago:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that the study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[21]

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[16] Board of Education v. Mergens, 496 U.S. 226, 250 (1990).

[17] The Supreme Court generally uses the term "public" to refer to the government and "private" to describe everything else. Outside the strictly legal context, the term "public," and certainly the terms "public life" or the "public square," are generally defined much more broadly to include any activity or sphere that is not removed from public view.

[18] Engel v. Vitale, 370 U.S. 421 (1962); Abingdon Township v. Schempp, 374 U.S. 203 (1963).

[19] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000).

[20] *See generally Religion in the Public Schools: A Joint Statement of Current Law*, which may be found at http://archive.aclu.org/issues/religion/relig7.html.

[21] Abingdon Township, 374 U.S. at 225 (1963).

Comments such as these have opened the door to a movement to teach about religion in the public schools, a movement that has had added vigor since the attacks of September 11, 2001, when it became painfully clear that we cannot understand our world or our nation without understanding religion.[22]

The Supreme Court also has generally embraced a broad equal access policy that essentially allows religious groups to express themselves on public property when a wide range of other non-governmental groups are permitted to do so. Not only has the Court required a state university to open its facilities to student-organized religious clubs when it made those facilities available to a wide range of other student clubs,[23] it also has upheld a federal law that essentially applies this same policy to public secondary schools.[24] Further, Supreme Court rulings have extended this general principal to community groups' after-hours use of public school property.[25] The Court also has held that a cross sponsored by private citizens may be temporarily erected in a city park if other symbols also were permitted this access and it was otherwise clear that the displays were not endorsed by the government.[26] In many ways, these public spaces represent the quintessential American public square, and it is particularly important that the Court has found that the government generally must welcome religious groups and expression here when it welcomes non-religious groups and expression.

As discussed in greater detail below,[27] there are times when the Court has found that even religious expression by a citizen or private group can be so closely associated with the government that it is properly attributable to the state and thus unconstitutional, [28] but this is not a hostile attempt to cleanse public property of religious speech. Rather, it is a careful effort to avoid governmental promotion or endorsement of religion. Unlike France, for example, which is moving toward the adoption of a legal ban on the wearing

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[22] See transcript for conference jointly sponsored by the Pew Forum and the Freedom Forum First Amendment Center entitled, *Teaching About Religion: Where Do we Go From Here?* http://pewforum.org/events/index.php?EventID=48 . Indeed, this movement is maturing, with many urging those who set education policy to move beyond what Yale University professor Jon Butler has called the "jack-in-the-box" approach to religion's role in history. Butler explained:

> [W]e have a kind of jack-in-the-box history in which religion pops up mysteriously in American history textbooks in the 1980s. Why? Because someone has to explain how Ronald Reagan came to the presidency. Someone has to explain the "Christian Right" and the liberal response. If the textbooks describe a movement called the Moral Majority, they don't explain where the Moral Majority came from or how it came to exercise so much political power so suddenly.

*See id.* at http://pewforum.org/events/0520/keynote.pdf Instead, we should pursue a more systematic and organic form of teaching about religion's impact on history.

[23] Widmar v. Vincent, 454 U.S. 263 (1981).

[24] Board of Education v. Mergens, 496 U.S. 226 (1990)(rejecting constitutional challenge to the federal Equal Access Act).

[25] Good News Club v. Milford Central Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[26] Capitol Square Review v. Pinette, 515 U.S. 753 (1995).

[27] *See also infra* pp. 8-13.

[28] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

of "conspicuous religious symbols" by students in its public schools,[29] the key question in our country is to whom the speech is attributable, not where the speech takes place. This constitutional standard captures the common-sense truth that when a Muslim girl wears a headscarf to public school, it is abundantly clear that the headscarf is her religious expression, not that of the government.[30] Thus, this standard protects the crucial right of individual and corporate religious expression while also guarding against the damaging impression that the state favors certain religions over others, or religion over non-religion.[31]

The Supreme Court's decisions also preserve a public role for faith in the realm of politics and policymaking.[32] Private citizens clearly have a constitutional right to comment on issues of public concern in religious terms, as do non-governmental organizations.[33] The Court said in 1970: "Adherents of particular faiths and individual churches frequently take strong positions on public issues . . . . Of course, churches as much as secular bodies and private citizens have that right."[34] Moreover, religion may inform public policy, as long as religion is not the "preeminent" reason for the government's action and the action has a clear, bona fide non-religious purpose and primary effect.[35]

Furthermore, the Constitution protects the right of all Americans to hold public office, regardless of their faith or lack thereof.[36] More specifically, the Court has found that a state law disqualifying ministers from holding public office violated the Constitution.[37] And, although the Court has not directly addressed this issue, many agree that the Constitution provides political candidates and public officials with a great deal of

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[29] On March 3, 2004, the French Senate adopted a recommendation of a special commission on religion in France, approving a bill barring the wearing of "conspicuous religious symbols" in the nation's public schools. Justin Vaisse, *Veiled Meaning: The French Law Banning Religious Symbols in Public Schools*, U.S. France Analysis Series (The Brookings Institution, March 2004). While on its face the policy affects religious symbols of all kinds, it is no secret that it is aimed primarily at Muslim girls who wear headscarves to school. *Id.* at 4. French commentators have called the headscarf "a symbol of Islamic militancy" and characterized the law as part of a "red line" drawn by the French government against "increasing challenges by militant radical Islam . . . ." *Id.*

[30] *See also infra* pp. 13-15.

[31] Epperson v. Arkansas, 393 U.S. 97, 104 (1968)("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). Moreover, it is important to remember that the First Amendment to the U.S. Constitution only restrains the government -- it does not restrain the many non-governmental sectors of society that form public culture, whether it is the media, the internet, sports, private education, business or entertainment. The current popularity of the movie, "The Passion of The Christ" and books such as the "Left Behind" series and "Conversations with God" remind us, for example, that religion influences American public life in significant ways, and that this kind of influence raises no constitutional concern.

[32] *See generally* Melissa Rogers, *Religion, Policy and Politics: The Rules of Engagement* (forthcoming, June 9, 2004), which may be found at www.americanprogress.org (hereinafter *The Rules of Engagement*).

[33] *See generally* Laurence H. Tribe, *American Constitutional Law* 1236 (2d ed. 1988). *See also infra* note 34.

[34] Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

[35] *See The Rules of Engagement, supra* note 32.

[36] Article VI of the Constitution states in part:"[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

[37] McDaniel v. Paty, 435 U.S. 618 (1978).

freedom to talk publicly about their religious convictions.[38]

**B. Where the U.S. Supreme Court Has Drawn the Line**

Thus, the Supreme Court has protected religious expression in the public square on many occasions. But it is also true that the Court has sometimes found certain religious expression unconstitutional because it is properly attributable to the government rather than to private citizens and groups.[39]

Do these rulings reflect hostility toward religious expression in the public square, or are they rooted in animus toward faith? The list that follows is a very brief and informal attempt to demonstrate some of the basic reasons why I answer these questions negatively. It describes some of the cases in which the Court found that the religious expression involved was unconstitutional, and discusses a few of the ways in which these rulings reflect benevolent motivations, rather than hostility to religion or religious speech.

- In its 1962 decision in *Engel v. Vitale*,[40] the Court held unconstitutional a New York law that directed the principal of each school district to ensure that a state-written prayer was said aloud by each class at the beginning of every school day. The Court said: "[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[41] Furthermore, the Court noted:

> [The] first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion. . . . It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong.[42]

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[38] *See The Rules of Engagement, supra* note 32.

[39] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000). In Allegheny County v. ACLU, the Court stated:

> [T]he Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message.

492 U.S. 573, 600-01 (1989)(citation omitted).

[40] 370 U.S. 421 (1962).

[41] *Id.* at 425.

[42] *Id.* at 431, 433-34.

This decision safeguards religious freedom and religion. If public school teachers lead their classes in prayer, it inevitably results in governmental favoritism for some faiths over others. The teacher must determine whose prayer to pray and which faiths will have more public prayer opportunities. In some school districts, for example, scores of religions are represented, which highlights the unwieldiness of this task. Even in places that are not as religious diverse, there are usually at least several different faiths represented, along with multiple theological interpretations of each of these faiths.

Furthermore, allowing public schools to engage in the explosive task of picking and choosing among prayers and sacred texts invites political divisiveness along religious lines.[43] It also sends the message that public schools only belong to those who hold certain religious beliefs, rather than to all students and all who support these schools with their tax money.

And when the state is permitted to prescribe prayers, the state also is allowed to usurp the rights of parents to direct the religious upbringing of their children.[44] More broadly, this permits the state to have a role in shaping religious expression, a prospect that should frighten all religious people, but especially those who support a more limited government.

Finally, it should be noted that school-sponsored prayer usually produces one of two bad results. Sometimes this practice results in prayers that are specific to a particular religious tradition and thus have the tendency to upset those outside the faith who are pressured to participate. At other times, this practice results in an effort to make public prayer please everyone. In these cases, worship of and dialogue with God is reduced to, as some have said, a "nice thought" that actually offends many people of faith.

- In its 1968 decision in *Epperson v. Arkansas*,[45] the Court held unconstitutional an Arkansas law that prohibited the teaching in its public schools and universities of the theory of evolution. In its opinion, the Court stated:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster,

[43] As the Court has said: "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989)(quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring)). *See also id.* at 687 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.") *See also Agostini v. Felton*, 521 U.S. 203, 233-34 (1997)(noting that the fact that governmental action might increase "political divisiveness" is insufficient by itself to create an unconstitutional "excessive church-state entanglement," but that this factor continues to be relevant).
[44] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
[45] 393 U.S. 97 (1968).

> or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[46]

The Court specifically noted that "study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, [but] the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion."[47] This reasoning conveys a respect for the neutral role of the state rather than hostility to religion.

- In its 1985 decision in *Wallace v. Jaffree*, the Court struck down an Alabama moment-of-silence statute. The Court's opinion did not indicate that all moments of silence laws were unconstitutional, but that this particular Alabama measure must be invalidated because it "was not motivated by any clearly secular purpose – indeed the statute had *no* secular purpose."

  As Justice O'Connor has emphasized, requiring a law to manifest a secular purpose "is not a trivial matter"; instead, it "serves [the] important function" of "remind[ing] government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share."[48] Consistent with this reasoning, other commentators have explained:

  > [I]f government ( a state legislature, say) makes a coercive political choice requiring or forbidding persons to do something, and if the only reason or reasons that can support the political choice are religious – if no plausible secular rationale supports the choice – then government has undeniably imposed religion on those persons whom the choice coerces. That is so whether or not the political choice compels persons to engage in what is conventionally understood as an act of religious worship.[49]

  Moreover, the other guidance the Court has offered regarding the requisite "non-religious purpose" reveals that, while the balance the Court has struck is not perfect, it is fair-minded.[50]

- In its 1989 decision in *Allegheny County v. ACLU*,[51] the Court held that a crèche placed on the "Grand Staircase" of a county courthouse was unconstitutional because it constituted a government endorsement of religion. Given the centrality

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[46] *Id.* at 103-04.
[47] *Id.* at 106.
[48] *Id.* at 75, 75- 76 (O'Connor, J., concurring in the judgment).
[49] Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* at 36 (Oxford University Press, 1997) (footnote omitted).
[50] *See supra* p.7 and notes 32-38.
[51] 492 U.S. 573 (1989)(finding crèche on Grand Staircase unconstitutional, but upholding menorah display in public park).

and importance of the Grand Staircase in the city building, the Court found that "[n]o viewer could reasonably think that [the creche] occupied [its particular location there] without the support and approval of government."[52]

The Court majority noted that *dicta* from its previous opinions spoke approvingly of the pledge of allegiance and the national motto.[53] The Court observed that "there is an obvious distinction between crèche displays and references to God in the motto and the pledge[;] [h]owever history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."[54] The majority opinion concluded:

> [O]nce the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity. It is thus incontrovertible that the Court's decision today, premised on the determination that the creche display on the Grand Staircase demonstrates the county's endorsement of Christianity, does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires.[55]

Further, in a later ruling, the Court made it clear that religious symbols can be displayed on public property if the setting is open to other privately sponsored symbols and if it is otherwise clear that the government is not endorsing religion.[56]

- In its 1992 decision in *Lee v. Weisman*, the Court invalidated a public middle school's policy of including clergy-led prayer as part of the official school graduation ceremony.[57] The Court found that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school,"[58] and that the state-sponsored ceremony was "in a fair and real sense obligatory [for the students] . . . "[59] The Court also noted the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[60] Writing for the Court majority, Justice Anthony Kennedy said:

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[52] *Id.* at 599-600.
[53] *Id.* at 602-03.
[54] *Id.* at 603 (footnote omitted).
[55] *Id.* at 612-13.
[56] *See supra* note 26.
[57] 505 U.S. 577 (1992).
[58] *Id.* at 587.
[59] *Id.* at 586.
[60] *Id.* at 592.

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the [government.] The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to [the non-governmental] sphere, which itself is promised freedom to pursue that mission.[61]

Furthermore, the Court concluded:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. But these matters, often questions of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.[62]

Thus, this case stands for the important proposition that the state cannot direct prayer and religious activities and coerce citizens, particularly students, to participate in such activities. This ruling helps to prevent the government from creating a union between church and state while it allows other graduation-related religious expression to occur on public property, such as a voluntarily attended, privately sponsored baccalaureate services that use school facilities.[63]

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[61] *Id.* at 589.
[62] *Id.* at 598-99 (citations omitted).
[63] See *Religious Expression in Public Schools*, which states:

> Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

This statement on religious expression may be found at www.ed.gov/Speeches/08-1995/religion.html.

- Finally, in *Santa Fe Indep. Sch. Dist. v. Doe*,[64] the Court held facially invalid a public school policy that established a student vote regarding "a brief invocation and/or message" to be delivered during the pre-game ceremonies of home varsity sporting events because "it establishe[d] an improper majoritarian election on religion, and unquestionably ha[d] the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.[65] Before 1995, the student council chaplain delivered prayers over the public address system before each varsity home football game. This policy was later revised to include a school-sponsored election to designate one student to deliver the "brief invocation and/or message" at home games during a particular football season. The Court found that the school's involvement in this process was substantial, and that, '[i]n this context[,] the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[66]

  It also noted:

  > The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.[67]

Both the Court's rationales and its words, therefore, demonstrate that its decisions do not reflect hostility toward religious expression.

## II. Do the Actions of Other Governmental Bodies Reflect Hostility to Religious Expression in the Public Square?

This section examines some of the other claims of governmental hostility toward religious expression in the public square. Current information about some of these cases is incomplete, so I discuss them only briefly and with that caveat.

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[64] 530 U.S. 290 (2000).
[65] *Id.* at 317.
[66] *Id.* at 308.

[67] *Id.* at 313 (citations omitted).

### A. Nashala Hearn

The case of Nashala Hearn appears to be one in which school administrators made a serious mistake about the law and attorneys, including those at the United States Department of Justice, moved quickly to rectify that mistake.[68] A Department of Justice press release states that "while Hearn was prohibited from wearing her hijab, the school district allowed certain other students to wear head coverings for non-religious purposes."[69] There is "generally . . . no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices," but the law prohibits schools from "singl[ing] out religious attire in general, or attire of a particular religion, for prohibition or regulation."[70] It also prohibits public schools from making exceptions to general rules for secular but not religious reasons.[71]

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[68] *Justice Department Reaches Settlement Agreement With Oklahoma School District in Muslim Student Headscarf Case* (May 19, 2004), which may be found at http://www.usdoj.gov/opa/pr/2004/May/04_crt_343.htm

[69] *Id.* A press release issued by the American Jewish Congress states:

> Although the United States Constitution permits a school to insist that all students go bareheaded, Muskogee had an unwritten exception. It allowed students who had lost their hair for medical reasons to cover their heads. The AJCongress brief argued that, while school officials were to be commended for their sensitivity to children with medical conditions, they could not acknowledge some reasons for allowing head coverings but not religious ones. "The Muskogee School District saw the inequity in its practice and has, therefore, decided to change its policy," AJCongress General Counsel Marc Stern said. "The fact that they also have to implement sensitivity training and publicize the new dress codes is a big step in broadening the minds of students' knowledge and understanding of other cultures and religions," Stern added.

*American Jewish Congress Praises Oklahoma Religious Accommodation Settlement* (May 19, 2004), which may be found at http://ajcongress.org/pages/RELS2004/MAY_2004/may04_03.htm.

[70] As widely accepted guidance on this issue notes:

> Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

*See* Guidelines on Religious Expression in the Public Schools, which may be found at www.ed.gov/Speeches/08-1995/religion.html.

[71] See *Justice Department Reaches Settlement Agreement With Oklahoma School District in Muslim Student Headscarf Case* (May 19, 2004), which may be found at http://www.usdoj.gov/opa/pr/2004/May/04_crt_343.htm In my opinion, the law should be even more generous in this area. The law should not only protect the right to wear religious garb when other garb is permitted to be worn on government property, but the law also should require the state generally allow religious garb to be worn even if other garb is not permitted. As Oliver "Buzz" Thomas has said, "a yarmulke is not a baseball cap." Religious exercise is a fundamental right and it sometimes requires the government to create targeted exemptions that allow people to practice their religion free from

Other than the fact that a settlement agreement was reached, I have no information about the school's motivation for its actions. The evidence of which I am aware suggests to me not generalized hostility toward religious expression, but perhaps an instance of particularized hostility toward the Muslim faith. In the wake of the September 11, 2001, attacks, there is a need to educate the American people about Islam and the Sikh religion, which is often confused with Islam. President Bush deserves great credit for his sensitivity to this issue in the immediate aftermath of the attacks, and I applaud the action of his Department of Justice in the Hearn matter. Programs sponsored by the Sikh Mediawatch and Resource Task Force and the Council on Islamic Education also have helped to educate the public and local law enforcement on these issues.[72] The remedy for problems such as these should focus principally on continued leadership by President Bush and his administration through rhetoric and enforcement of legal rights, as well as through private and public education programs.

**B. Balch Springs Senior Center**

According to the U.S. Department of Justice, the Balch Springs Senior Center case stems from the city's decision in August 2003 "to stop allowing seniors at the city owned multi-purpose senior center to pray before meals, sing gospel songs and listen to a weekly devotional speech given by a Protestant minister who was also a member of the center."[73] In November 2003, the Justice Department opened an investigation into this matter.[74] Shortly after the Department of Justice opened its investigation, the Balch Springs City

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governmental interference, even if the government does not make other exceptions to the law for secular reasons. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972).

The Supreme Court abandoned its more generous interpretation of the law of free exercise in its 1990 decision in *Employment Division v. Smith.* 494 U.S. 872 (1990). In response to that decision, the Congress passed the Religious Freedom Restoration Act (RFRA), which broadly prohibited both the federal and state governments from substantially burdening religion without a compelling state interest. 42 U.S.C. Section 2000bb-1 *et. seq.* (2004). While the Supreme Court invalidated RFRA's application to the states in 1997, it continues to bind the federal government. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).
In the wake of this 1997 Supreme Court decision, Congress enacted the Religious Land Use and Institutionalized Persons Act, *see supra* note 8, and a number of states enacted state versions of the federal Religious Freedom Restoration Acts (state RFRAs), including Oklahoma, that mirror the original RFRA, but obviously bind only the states where they are enacted. *See, e.g.,* 51 Okl. St. Section 523 (2004). (It is unclear whether Hearn's attorneys invoked this statute in their challenge to the school district's action.)

During my service with the Baptist Joint Committee, I worked toward the enactment of these state RFRAs and I continue to support them. Consistent with the federal RFRA, I believe such statutes should explicitly state that they are not intended to affect state non-establishment provisions. (In other words, I believe it would be helpful to strengthen certain legal protections for the free exercise of religion, but I would oppose the weakening of establishment clause protections.) I believe that these state RFRAs are probably the best response to the problem of free exercise under-protection, given the Court's recent constriction of federal legislative power.

[72] *See* Web Sites of the Council on Islamic Education, http://www.cie.org, and the Sikh Mediawatch and Resource Task Force, http://www.sikhmediawatch.org.

[73] *Justice Department Closes Investigation of Texas City's Barring of Religious Speech at Senior Center,* http://www.usdoj.gov/opa/pr/2004/January/04_crt_006.htm (January 8, 2003).

[74] *Id.*

Council "voted unanimously to lift the ban on religious activity at the center and to adopt a policy that [would] permit speakers to address center members without regard to the content or viewpoint of the address."[75] The Department reports that it closed its investigation into this matter in January, 2003, because the city and the seniors reached a settlement agreement.[76]

The Justice Department notes that "[a]ll of [the religious] activities were voluntary and run by involved seniors at the center, and not by the city or its employees."[77] Thus, this settlement and the city's revised policy would appear to be consistent with the broad equal access principles articulated by the Supreme Court.[78]

It appears, therefore, that this case was resolved rather quickly and clearly. The problem that this case seems to represent is not a problem with the law, but with understanding of it. To the extent that these non-public-school-related equal access principles are not well-understood, I would suggest better public education regarding these principles and their application.[79]

### C. Judge Roy Moore

While serving as Chief Justice of the Alabama Supreme Court, Roy Moore installed a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. Moore did so at night "without the advance approval or even knowledge of any one of the other eight justices of the Alabama Supreme Court."[80] According to the federal court of appeals that heard Moore's case, "[n]o one who enters the [judicial] building through the main entrance can miss the monument [--] [i]t is in the rotunda, directly across from the main entrance, in front of a plate-glass window with a courtyard and waterfall behind it."[81] Moore "rejected a request to permit a monument displaying a historically significant speech in the same space on the grounds that 'the placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument.' "[82]

The 11th Circuit Court of Appeals affirmed the lower court's finding that the placement of the monument in the state judicial building violated the Establishment Clause. It found that the facts of this case clearly indicated that the monument did not have the requisite secular purpose and that its primary effect was to promote religion.[83]

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[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *See supra* p.6
[79] As noted earlier, joint statements already have been drafted regarding the application of the federal Equal Access Act in public schools. *See supra* note 11.

[80] Glassroth v. Moore, 335 F.3d 1282, 1286 & 1285 (11th Cir. 2003).
[81] *Id.*

[82] *Id.* at 1284 (quoting Glassroth v. Moore, 229 F. Supp. 2d 1290, 1297 (M.D. Ala. 2002).
[83] *Id.* at 1297.

The appellate court emphasized that, "factual specifics and context are nearly everything when it comes to applying the Establishment Clause to religious symbols and displays."[84] It noted that it recently had upheld the constitutionality of a state seal with an image of two tablets, the first with Roman numerals I through V and the second with numerals VI through X. [85] The 11th Circuit also emphasized the fact that various federal appellate courts had come to different conclusions about Ten Commandments displays depending on their specific facts and circumstances. It favorably referenced a recent ruling of another appellate court, for example, that upheld a Ten Commandment plaque that had been on the outside wall of a "historically significant courthouse" for more than eighty years.[86] The 11th Circuit quoted this court's finding that "a new display of the Ten Commandments is much more likely to be perceived as an endorsement of religion" by the government than one in which there is a legitimate "preservationist perspective."[87] Furthermore, the court emphasized:

> We do not say, for example, that all recognitions of God by government are per se impermissible. Several Supreme Court Justices have said that some acknowledgments of religion such as the declaration of Thanksgiving as a government holiday, our national motto "In God We Trust," its presence on our money, and the practice of opening court sessions with "God save the United States and this honorable Court" are not endorsements of religion.[88]

But, Moore's case was fundamentally different from these cases in more ways than one, the court noted.

Moore's case does not stand for the proposition that all Ten Commandments displays are unconstitutional. This case does not prohibit public officials from acknowledging God.[89] This case does not reflect hostility to religion. Instead, this case stands for the proposition that the American government will not endorse the majority Christian faith over other faiths. It stands for the principle that the government will not become involved in the propagation of religion, but will leave that task to citizens and houses of

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[84] *Id.* at 1300.

[85] *Id.* at 1298-99.

[86] *Id* at 1300 (citing Freethought Soc'y v. Chester County, 334 F.3d 247 (3d Cir. 2003)). In contrast, the *Glassroth* court stated:

> This case on its facts is closer to those in which the Sixth and Seventh Circuits have held prominent displays of the Ten Commandments on government grounds to violate the Establishment Clause. See *Adland v. Russ, 307 F.3d 471 (6th Cir. 2002)* (returning a large, granite Ten Commandments monument from storage to a prominent position on the capitol grounds would violate the *Establishment Clause*), cert. denied, *155 L. Ed. 2d 826, 123 S. Ct. 1909 (2003)*; *Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001)* (erecting a seven-foot tall, 11,500-pound limestone monument, one side of which contained the Ten Commandments, on statehouse grounds would violate the *Establishment Clause*) cert. denied, *534 U.S. 1162, 152 L. Ed. 2d 117, 122 S. Ct. 1173 (2002)*; *Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000)* (displaying a Ten Commandments monument, identical to the one involved in Adland, on the lawn of the municipal building violated the *Establishment Clause*), cert. denied, *532 U.S. 1058, 149 L. Ed. 2d 1036, 121 S. Ct. 2209 (2001)*.

[87] *Id.* at 1300 (quoting Freethought Soc'y v. Chester County, 334 F.3d 247 (3d Cir. 2003).

[88] Glassroth, 335 F.3d at 1301.

[89] *See supra* p.7

worship. This case stands for the notion that American courts belong to all of us, and not just those who believe certain things.

In addition to justifying its conclusion regarding the constitutional impropriety of Judge Moore's Ten Commandment's monument, the 11th Circuit Court of Appeals also highlighted the ramifications of Moore's theory of the case:

> The breadth of the Chief Justice's position is illustrated by his counsel's concession at oral argument that if we adopted his position, the Chief Justice would be free to adorn the walls of the Alabama Supreme Court's courtroom with sectarian religious murals and have decidedly religious quotations painted above the bench. Every government building could be topped with a cross, or a menorah, or a statue of Buddha, depending upon the views of the officials with authority over the premises. A creche could occupy the place of honor in the lobby or rotunda of every municipal, county, state, and federal building. Proselytizing religious messages could be played over the public address system in every government building at the whim of the official in charge of the premises.[90]

In my opinion, using government power to pressure fellow citizens along religious lines it is not only unconstitutional, it is also wrong. It is a failure of compassion, among other things, for Christians to ignore the impact this kind of state endorsement of religion would have on our own lives if it involved a religion other than our own. If we were faced with such governmental pressure to acknowledge Islam, for example, it would create a profound crisis of conscience for us. Perhaps this explains why it seems that some are so anxious to encourage the separation of mosque and state in other nations, but less anxious to support separation of church and state here at home. Instead, we should fight to extend to others the religious freedom we demand for ourselves.

Further, the Moore case points to a troubling tendency among some to claim that anytime religious expression is prohibited on the grounds that it constitutes governmental endorsement of religion, or anytime the government denies funding for religious activities, it is tantamount to hostility toward or discrimination against religion. The failure to consider benevolent explanations for these actions reflects a lack of understanding of American law and history.[91]

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[90] Glassroth, 353 F.3d at 1294.

[9191] In its recent decision in *Locke v. Davey*, the United States Supreme Court rejected this argument. 124 S. Ct. 1307 (2004). In the *Locke* case, the Court ruled that the state of Washington did not violate the federal Constitution's Free Exercise Clause when it established a program that allowed college scholarship funds to be used for many types of study, but prohibited the use of the scholarship money for degrees in devotional theology. Although the lower court has suggested that this state prohibition reflected hostility toward religion, the Supreme Court concluded:

> [T]he subject of religion is one in which both the United States and state constitutions embody distinct views -- in favor of free exercise, but opposed to establishment -- that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

**IV. Conclusion**

Religion plays a vital role in public life, but religion's public role is not limitless, nor should it be. Rather than criticizing the constitutional prohibition on governmental promotion of religion, we should honor it for the way in which it guarantees equality for all, freedom of choice in religious matters and basic autonomy for the religious sphere.

Respectfully submitted,

Melissa Rogers

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*Id.* at 1313.

Indeed, leading eighteenth-century American Baptists protested against state financial support for religion not because they were hostile to faith, but because they believed the government should stay out of religious affairs. For example, Baptist preacher Isaac Backus protested against the Massachusetts state establishment, saying: "And as it is evident to us that God always claimed it as his sole prerogative to determine by his own laws what his worship shall be, who shall minister in it, and how they shall be supported, so it is evident that this prerogative has been, and still is, encroached upon in our land." *See generally* Melissa Rogers, *Traditions of Church-State Separation: Some Ways They have Protected Religion and Advanced Religious Freedom and How They Are Threatened Today*, 18 U. Va. Jnl. of Law and Politics 277, 285 (2002).

TESTIMONY OF STEVEN ROSENAUER BEFORE U.S. SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
(JUNE 8, 2004)

Good afternoon. My name is Steven Rosenauer and I live with my wife and two children in Bradenton, Florida. At the request of the Committee, I am here to testify about the important issue of religious liberty in America as it has recently affected my family.

Both my children attend public school in Manatee County, where we live. Last spring, my wife and I were very proud when we were invited to the school board meeting on May 5, 2003, along with my son Joshua, so that the board could recognize and honor him for winning first place in several events at the Technology Student Association State Competition. Several other students were at the meeting so that they could be recognized for similar achievements.

As my wife and son and I sat in the audience, the school board's chair called the meeting to order. Then, to my surprise, she told everyone in the audience to "please stand for the Lord's Prayer" and the pledge of allegiance. The Board members then stood, bowed their heads, and led most of the audience in reciting the Lord's Prayer, a well known Christian prayer considered by Christians to be the prayer taught by Jesus to his disciples. My family is Jewish, and we were shocked and felt uncomfortable and excluded by these actions of our community's elected officials at an official school board meeting. On our way home, my son, my wife and I were all upset. As I explained in a letter I wrote that same night to the school board chair, "I was very offended when you had everyone present rise for a ceremony that I consider against my religion."

For the next several months, board members continued to lead the Lord's Prayer at board meetings, despite my letter as well as letters from People For the American Way Foundation, which had agreed to help me and my family. Some community members made disturbing statements, such as one urging the board to "stand on Jesus Christ" and not to bend to "foreign gods." Some board members strongly defended their actions as permissible religious expression of their faith. One went so far as to state that the Supreme Court isn't "the eternal supreme court," and that perhaps he would have to be taken out in handcuffs one day. But even Pat Robertson's American Center for Law and Justice recognized that the practice was unconstitutional, and that the only type of invocation that could possibly be legal would have to be truly nonsectarian and clearly voluntary. As the *Sarasota Herald Tribune* explained:

> "Manatee is home to a diverse mix of religious faiths. It's chauvinistic for the board to impose a distinctly Christian prayer on everyone attending its meetings. Doing so sends a message, intentional or not, that citizens who don't share the board's faith are viewed in a lesser light...Out of respect for the community's religious diversity – not to mention the Constitution – the board should drop the prayer and end this controversy."

I became hopeful in August, when the board adopted guidelines for its meetings to begin with nonsectarian invocations. But the board repeatedly violated those guidelines as ministers invited by the board led public, sectarian prayer, including prayer in the name of Jesus, despite repeated letters from us. In February, with the pro bono help of People For and the law firm of Hunton and Williams, we filed suit in federal court, after trying for more than six months to resolve the issue.

For awhile, things got even worse. We received anonymous threatening phone calls, like one telling us we should move out of the county if we didn't like "the way they do things here," and the call that threatened "we know where you Jews live and if you don't drop the lawsuit there

will be trouble." And during the Jewish holiday of Passover in April, someone vandalized our home by throwing red oil-based paint on the front door and garage door of our house and our truck outside. It reminded us all too chillingly of what has happened to Jews and other religious minorities in other countries, where they don't have the religious freedom and separation of church and state that are the foundation of our great country. My family believes that some school board members and others in the community helped foster the atmosphere where these types of actions occurred when they made public statements of intolerance and their own disdain for the courts.

Both newspapers in our area have strongly supported our position. And I am pleased to report that just last week, the court approved a settlement that we reached with the board, which includes an enforceable consent decree calling for the board to make sure that only truly nonsectarian prayer can be used to open board meetings.

We are hopeful that this situation is now truly behind us. But it has reminded us of the importance of true religious liberty in America, and the dangerous consequences of allowing improper government promotion of religion and eroding the separation of church and state. The Constitution protects the religious liberty of all Americans, not just those of one faith. My family's situation has highlighted the importance of our federal courts in protecting that fundamental principle. Thank you very much.

TESTIMONY OF KELLY SHACKELFORD

CHIEF COUNSEL

LIBERTY LEGAL INSTITUTE

BEFORE

THE SENATE SUBCOMMITTEE ON THE CONSTITUTION

JUNE 8, 2004

ON

**HOSTILITY TO RELIGIOUS FREEDOM**

## OPENING REMARKS

Chairman Cornyn, Ranking Member Feingold, and members of the Senate Subcommittee on the Constitution, thank you for extending the invitation to me to testify before you on the subject of the current hostilities to religious freedom.

I respectfully request that the entirety of my personal statement be made a part of the record of today's hearing.

## INTRODUCTION

Unfortunately, we do not have to look to Canada's recent passage of a hate speech law, which makes it a crime to read sections of the Bible, to find outrageous violations of religious freedom.(add cite) We have our own problems here in the U.S.

While I have been Adjunct professor of Law at the University of Texas School of Law since 1994 teaching Religious Liberties, I speak to you today as the Chief Counsel of the Liberty Legal Institute. I have spent the past 15 years as litigator in the area of constitutional religious freedoms and have overseen hundreds of cases. The hostility is real. We see it everyday. There are those who feel they are doing the country a service by removing all religious vestiges of our country and restricting religious speech from the public arena; and they are having great success.

Ten Commandment displays are being removed by court orders across the country.(add cites) "Under God" is being challenged in our pledge. (add cite) Cities are having all religious symbols removed form their city seals. (add cite)

Churches and synagogues are being banned from entire communities and children are being told their religious expression is banned in school.

## CASES

In the short time I have, I just want to share a few of our cases as an example. You have already heard from one of our clients, Barney Clark heard. In Balch Springs, the senior citizens were told they could not sing Gospel songs or pray over their meals in their own senior center, because it was a public building. They were shocked. Only after an extensive lawsuit over months and attorneys who donated over $80,000 of time did they get their rights vindicated.

In *Barrow v. Greenville ISD*, teacher Karen Barrow waited 9 years for an assistant principal job to open. When it did, she was told by the superintendent she could only have the job if she removed her children from the private, Christian school they attended. When she stated she could not do that, she was told she had "no future" in the district. Superintendents from across the state testified in depositions that this is the customary approach by Superintendents. Mrs. Barrow's case is still ongoing, after 6 years, with over a million dollars of attorney's time having been donated so far for this teacher.

In the *H.E.B. Ministries (add cite)* case, Tyndale Seminary was fined $173,000 for issuing 34 diplomas in the Bible without first getting state approval of its curriculum, board, and professors. The lower courts have ruled against them at each step of the way up to this point. Small African American and Hispanic

seminaries across the state are being shut down for failing to get state approval as well. The Institute for Teaching God's Word Seminary, an African-American seminary which was simply training black pastors in the Bible, was shut down for not getting State approval first of their board and curriculum.

Even more disturbing to me are the actions taken against children:

- Jonathan Morgan just wanted to give a gift to his fellow students at the Christmas Party like everyone else was. School officials, however, stopped him at the door because his candy cane had a religious message on it. The school district and its attorneys have refused to back down and Jonathon and his family are now forced to prepare a lawsuit to simply have the right to pass out a candy cane at school to his friends.
- Hispanic Kindergartner Doe saw that other children were bringing Pokemon and other cards to share at school. When she brought her cards, however, they were confiscated from the hands of her classmates and school officials told her to "never bring religious things to school." To this day, she is scared to bring or say anything religious at school.
- Another one of our clients, an elementary school girl, was told she could give pencils to her friends at school but not ones with "Jesus" on them. Crying, she asked her mom "why does the school hate Jesus?"

These young kids get the message. Their religion is treated the same as a curse word. These children are being taught at an early age, "keep your religion to yourself" "it's dirty" "it's bad." That is wrong.

Many are aware of the *Doe v. Santa Fe ISD* football game prayer case. Few are aware of the order below in which the federal judge not only ordered the students not to pray in Jesus' name but told them that federal marshals would be in attendance to carry any student who did so to the Galveston County jail for up to six months. The judge then stated, and I quote, "Anybody who violates these orders, no kidding, is going to wish that he or she had died as a child when this court gets through with it." This is the atmosphere we have created in the schools and in this country for our children.

## NATIONAL MONUMENTS

Last, I want to mention the Ten Commandments case in which we were involved. In *Van Orden v. Perry*, (add cite) we pointed out that this attempt to remove the Ten Commandments was a clear attempt at religious bigotry and hostility. Numerous monuments exist around the Texas Capitol grounds. The attempt to ban only the historical monument with religious content is wrong. It is an attempt to censor and erase the religious parts of our history.

## CONCLUSION

The hostility is real. A pervasive atmosphere has been created in our country to ban religion in public. The "separation of religion and state" fundamentalists and activist courts are succeeding in sowing confusion and an

atmosphere of hostility—with most government officials now even feeling they have some duty of "religious cleansing" in public.

We are moving quickly towards a naked public square with religion being treated as pornography when expressed in public. The hostility has spread quickly from across our public schools to all aspects of public life- including our historical monuments. If we do not begin to speak up and act now, we will lose the great religious heritage and freedoms upon which this country was founded. That would be a terrible mistake.

**United States Senator * Alabama**
For More Information Contact:
Virginia Davis (202) 224-6518

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# SHELBY DISCUSSES 'CONSTITUTION RESTORATION ACT' BEFORE SENATE COMMITTEE

WASHINGTON, DC - Senator Richard Shelby (R-AL) today testified before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights to discuss the 'Constitution Restoration Act of 2004.' This legislation reinforces states rights by clarifying that the Supreme Court and district courts do not have jurisdiction to hear cases brought against a federal, state or local government or officer for acknowledging God as the sovereign source of law, liberty, or government. The following is Senator Shelby's opening statement before the subcommittee.

"Chairman Cornyn, Senator Feingold and members of the Subcommittee, thank you for holding this important hearing and for having me here to discuss the 'Constitution Restoration Act.'"

"Joined by Senators Miller, Brownback, Allard, Graham, Bunning, Lott and Inhofe I introduced S. 2323, the Constitution Restoration Act. Like millions of Americans, I believe that the Courts have exceeded their power. This legislation recognizes the rights of the states and the people as embodied in the Declaration of Independence and the Constitution (ninth and tenth amendments) to acknowledge God. In short, this legislation goes to the very foundation of our country and the legitimacy of our system of government."

"Over the years, we have seen a disturbing and growing trend in our federal courts to deny the rights of our states and our citizens to acknowledge God openly and freely. These tortured legal decisions distort our constitution, our nation's history and its tradition in an effort to secularize our system of government and divest morality from our rule of law."

"Four years ago, the Supreme Court determined that students could not engage in voluntary prayer at a school football game. Last year, the Ninth Circuit Court of Appeals ruled that it was unconstitutional to recite the words 'one Nation under God' in the Pledge of Allegiance and a district court in my State of Alabama ruled that it was unconstitutional to display the Ten Commandments."

(MORE)

"It is unfortunate that there are so many examples to point to because the simple fact is: our government and our laws are based on Judeo-Christian values and a recognition of God as our Creator. The Declaration of Independence by which we justify the very foundation of our political system holds these truths to be self-evident: "that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights.""

"Our motto is 'In God We Trust.' It is enshrined on our currency."

"Our national anthem recognizes our motto as 'In God is Our Trust.'"

"As federal officials, we each took an oath of office swearing to uphold the Constitution, 'so help me God.' The President takes a similar one. State and local officials and our military personnel all swear a similar oath. Jurors and witnesses in our state and federal courts take an oath as do witnesses before Congress to tell the truth, 'so help me God.'"

"Our courts, including the Supreme Court, recognize God in their official proceedings, both the House and Senate acknowledge God through an opening prayer every morning. Our public buildings and monuments honor this heritage through various depictions of the basic moral foundations of our laws and system of government."

"My point Mr. Chairman, is that you simply can not divest God from our country. Our country has no foundation without a basic recognition that God invests us at birth with basic individual rights – such as the blessings of liberty -- that we all enjoy as Americans."

"There is no question that the Courts have exceeded and abused their power. The 'Constitution Restoration Act' recognizes the rights of the states and the people to acknowledge God, as embodied in the Declaration of Independence and the constitutions of the United States and the individual States."

"This recognition is the very basis for the First Amendment prohibition against the establishment of an official church or religion. The 'Constitution Restoration Act' further prohibits federal courts from basing their opinions on foreign law contrary to the Constitution they are sworn to uphold."

"The list of legal decisions abridging our right to acknowledge God is far too long. It is imperative that we exemplify how these decisions affect the lives of real people – that they are not just words on paper. I am pleased that the Committee has taken this step and will hear testimony from individuals who have had their rights abridged, and I look forward to their testimony."

"Thank you again for holding this hearing and for allowing me to testify."

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**110 Hart Senate Office Building, Washington, D. C. 20510 * (202) 224-5744**
**Email: senator@shelby.senate.gov * *Website: www.senate.gov/~shelby/***

TESTIMONY

OF

J. BRENT WALKER

ON BEHALF OF THE

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

REGARDING

"BEYOND THE PLEDGE OF ALLEGIANCE:

HOSTILITY TO RELIGIOUS EXPRESSION IN THE PUBLIC SQUARE"

TUESDAY, JUNE 8, 2004

## I. Introduction

Thank you, Mr. Chairman and Members of the Subcommittee, for this opportunity to speak to you on this very important matter.

I am J. Brent Walker, executive director of the Baptist Joint Committee on Public Affairs (BJC). I am an ordained Baptist minister and a lawyer. From 1995-2003 I served as an adjunct professor of law at Georgetown University Law Center, where I taught an advanced seminar in church-state law. I am now an adjunct professor at the Baptist Theological Seminary at Richmond. I speak today, however, only on behalf of the BJC.[1]

The BJC serves fourteen Baptist bodies,[2] focusing on public policy issues concerning religious liberty and its constitutional corollary, the separation of church and state. For sixty-eight years in our nation's capital, the BJC has pursued a well-balanced, sensibly centrist approach to church-state issues. We take seriously *both* religion clauses in the First Amendment as essential guarantors of God-given religious liberty. It is, indeed, our "first freedom."

## II. General Principles

The first sixteen words of the First Amendment to the Bill of Rights provide, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The wise architects of our republic fashioned these twin pillars – No Establishment and

[1] My curriculum vitae is posted at www.bjcpa.org. Neither I, nor the BJC, has received a federal grant or contract in the current or preceding two fiscal years.

[2] Alliance of Baptists, American Baptist Churches U.S.A., Baptist General Association of Virginia, Baptist General Conference, Baptist General Convention of Texas, Baptist State Convention of North Carolina, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A. Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention, Inc., Religious Liberty Council, and Seventh Day Baptist General Conference.

Free Exercise – and placed them first in the Bill of Rights to protect what many of them believed to be a God-given right – religious freedom.

The Establishment Clause is designed to keep government from promoting, endorsing or helping religion. The Free Exercise Clause is intended to prevent government from discouraging, burdening or hurting religion. The two, taken together, call for what Chief Justice Warren Burger called a "benevolent neutrality" on the part of government. The religion clauses require government to accommodate religion without advancing it, protect religion without promoting it, lift burdens on the exercise of religion without extending religion an impermissible benefit. These twin pillars buttress the wall of separation that is critical to ensuring our religious liberty. The best thing government can do for religion is to leave it alone.

The separation of church and state is relatively modern and distinctively American. True, it enjoys some biblical warrant. The notion that our relationship to God should be voluntary supports it; Jesus' admonition to "render to Caesar the things that are Caesar's and unto God the things that are God's" foreshadows it; the early church's refusal to seek help from Herod or scheckels from Caesar models it.

Nevertheless, throughout most of the history of Western civilization there was, little, if any, affection for the separation of church and state. But the painful lessons of history teach that when government takes sides in religion – for or against – someone's religious liberty is denied and everyone's is threatened.

Our nation's founders had a decidedly different vision. The Constitution never mentions Christianity. It speaks of religion only once in Article VI, and then to ban a religious test for public office. With the adoption of the religion clauses in the First Amendment two years later,

our founders made it clear that the state must not take sides in matters of religion and one's status in the civil community would not depend on a willingness to espouse any religious confession.

Our founders understood existentially that government and religion are both better off when neither tries to do the job of the other. When the state and the church are tied together, the church tends to use civil power to enforce its brand of religion and the state palms off the name of God to support its stripe of politics. But when the two are separated, religion tends to flourish, and the state is required to respect religious diversity. Far from encouraging hostility to religion, it has been indispensable in ensuring the greatest measure of religious liberty the world had ever seen.

The constitutional requirement of keeping church and state separate, however, does not call for the divorcement of religion from politics. The metaphorical wall of separation does not block metaphysical assumptions from playing a role in public life. Religious people have as much right as anyone else to vend their beliefs in the marketplace of ideas and (with some limits) to allow their religious ethics to influence public policy by preaching, teaching, organizing politically and even running for office. Far from being prohibited, as a Baptist Christian, I would say it is required. This is consistent with Jesus' call in the Sermon on the Mount to be "salt" and "light."

So, church-state separation and religious liberty are not opposing ideas engaged in a philosophical tug-of-war. Instead, separation is the means by which we ensure that liberty for everyone. The doctrine has never meant that church and state should be sealed off from each other with the state tending to important public affairs and the church shunted to the backwaters of private religion. Nor does it mean that religious people, when motivated to do so by their

religious convictions, cannot speak out on public policy issues along with the rest of the political community. Religious people are not second-class citizens.

Thus, the BJC has always been committed to two goals: (1) the institutional and functional separation of church and state as an essential constitutional hedge protecting our religious freedom; and (2) the right of people of faith to express their religion freely and to engage in the political process the same as everyone else. While at first glance these goals may appear contradictory, in reality they are not. We affirm both a robust role of religion in public life and the institutional and functional separation of church and state. Indeed, the latter protects the former.

Religious expression pervades American culture, the media and our politics. Anyone who has traveled abroad can see and feel the difference. We have come a long way since 1976 when Jimmy Carter announced he was a "born again" Christian and the Washington press corps – and most of the country for that matter – responded with befuddled amusement. They really did not know what he was talking about and were stunned that he spoke so freely and publicly about his faith.

Today, religious themes saturate the candidates' speeches and the public square generally. Religion animates most of the divisive current issues – from same-sex marriage, to abortion, to faith-based initiatives, to governmental posting the Ten Commandments, to the Pledge of Allegiance. "Larry King Live," "Crossfire," "Hardball," the "O'Reilly Factor," the "Today Show," "Real Time," and the evening news – they cannot seem to stop talking about religion.

Yes, we have come a long way over the past quarter century – as speaking of God seems now to be a mandatory (not just a permissible) part of our political rhetoric. And our willingness

as a culture to talk openly about religion belies any claim that we have a naked public square. Religious speech in public places by government leaders, the media and private citizens abounds – bumper stickers, billboards, John 3:16 end zone signs, post-game prayer huddles, cover stories on national news magazines, and religious programming on television and radio. And clearly the Mel Gibson movie, "The Passion of the Christ," has taken this to a new level.

No, we do not and should not have a naked public square. Religious speech in public places by private citizens is commonplace; candidates for office routinely voice religious themes and language; and even public officials revel in various forms of civil religion with near impunity. In fact, far from a naked public square, it is actually dressed to the nines.

The following are helpful guidelines as we seek to honor the separation of church and state, while affirming the relevance of religious values to public life:

We must:

- Defend the right of individuals and organizations to speak, debate and advocate with their religious voices in the public square.
- Stand firm by the principle that government action without a secular purpose or with a primary effect that advances or inhibits religion violates the separation of church and state.

Similarly, we should:

- Discourage efforts to make a candidate's religious affiliation or nonaffiliation a campaign issue.

- Discourage the invoking of divine authority on behalf of candidates, policies and platforms and the characterizing of opponents as sinful or ungodly.[3]

**III. Examples of Application**

Three contemporary issues provide good illustrations about how these general privileges play out in American life.

A. Religion in the Public Schools

A variety of church-state disputes commonly arise in the context of our public schools in ways that require a balancing of both no establishment and free exercise principles. The general rule is clear: the public schools must refrain from sponsoring religious exercises or otherwise promoting religion; but they should, and sometimes must, accommodate the free exercise rights of students. Voluntary, student-initiated prayer, for example, ordinarily should be permitted, but school-sponsored prayer must not be allowed. Public schools may *teach about* religion in history, social studies, comparative religion, and Bible-as-literature courses. But school officials should not *teach* religion in ways that would proselytize or promote a religious point of view.

The most recent Supreme Court case involving religion in the public schools addresses the more difficult issue of student religious speech in the context of pervasive state sponsorship. *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000). This case involved student-delivered prayers at football games in Texas. The Court, in a 6-3 vote, struck down the practice

[3] The American Jewish Committee, Baptist Joint Committee, The Interfaith Alliance Foundation, National Council of the Churches of Christ in the U.S.A., Religious Action Center of Reform Judaism, *A Shared Vision: Religious Liberty in the 21st Century* (Washington, D.C., 2002), 8.

as unconstitutional. The Court reasoned that the student prayer was so shrouded in government sponsorship that it amounted to a state endorsement of religion. The school district adopted a pro-prayer policy; it conducted and supervised the election of the student to give the prayer; the prayer was delivered in the midst of a school-sponsored event (i.e. football game); and the school provided the microphone over which the prayer was to be broadcast. Finally, the Court reasoned that granting the student body the power to elect a speaker to pray is problematic. The very practice of voting whether to have a prayer before football games, and who the "pray-er" would be, inevitably favors the majority religion in a given school district.

The focus of much of the current debate and developing case law is directed toward defining the proper contours of student-initiated religious expression. "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," issued by the United States Department of Education in 2003, addresses the issue in the context of school assemblies, athletic events and graduation. It provides that where students are selected on neutral criteria and retain "primary control" over what they say, that expression will not be attributed to the school, and, therefore, cannot be restricted because of its religious content. The guidelines go on to suggest that, to avoid misunderstandings, school officials may make "appropriate disclaimers" to clarify that the speech is that of the student and not the schools'. The guidelines supplement a more comprehensive set of guidelines issued by the United States Department of Education (www.ed.gov) in 1995 by the Clinton administration.

The bottom line, common sense approach requires that we seek to balance the no establishment principle (i.e., no government-sponsored religion) with the free exercise principle (i.e., accommodating the rights of students to exercise their religion without interfering with the right of other students not to participate).

B. Ten Commandments

The posting of the Ten Commandments demonstrates how religious expression by politicians and government officials can turn into a violation of the Establishment Clause. While religious expression by public officials is ordinarily permitted, there are constitutional limits.

The Alabama Ten Commandments case is illustrative of a governmental official expressing his own religious views in a way that clearly crossed constitutional boundaries and the federal courts were correct in so holding. Sitting as the highest judicial officer in the state of Alabama, Chief Justice Roy Moore (1) singled out one favored religious tradition, (2) chose the preferred Scripture passage, and (3) displayed it in a way that created nothing less than a religious shrine. While so doing, he made theological judgments throughout. Which Commandments? The ones found in Deuteronomy 5 or Exodus 20? Is it an English Old Testament version or the Hebrew Bible or maybe the Septuigent in Greek? If English, is it a Catholic or Protestant one? If Protestant, which translation – King James, New International Version or the Revised Standard Version? These are fundamentally religious decisions that government officials are uniquely ill-suited to make. How strange it is to create a graven image out of a document in which God says we are not supposed to have any graven images!

But, it is critical to acknowledge the difference between *government* speech endorsing religion, which the Establishment Clause prohibits, and *private* religious speech, which the Constitution protects, to paraphrase Justice Sandra Day O'Connor. *Board v. Mergens*, 496 U.S. 226 (1990). Religious speech by private citizens, even in public places, is not forbidden; it is protected and commonly practiced.

There are unlimited ways in which the Ten Commandments can be expressed in public without the help of government. For example:

1. They can be posted in front of every church and synagogue in the land at the edge of the property in full public view.
2. The Ten Commandments can be displayed even on *public* property if that property is dedicated as a free-speech forum.
3. One can hold up a sign "Exodus 20" or "Deuteronomy 5," instead of "John 3:16," in the end zones of televised football games.
4. Taking a lesson from the prophet Jeremiah, we can write the commandments on our "hearts" instead of on stone, thereby providing a living witness to the principles embodied in those teachings, in a way that truly makes a difference.

In sum, the question is not whether the Ten Commandments embody the right *teachings*; the question rather is who is the right *teacher* – American politicians, public officials and judicial officers – or parents, religious leaders and families? The answer is the latter; they do not need the help of the former. As a Baptist minister, I can think of little better than for everyone to read and obey the Ten Commandments; as a constitutional lawyer, I can think of little worse than for governmental officials to tell us to do it.

Finally, even public officials are not prohibited from considering the Ten Commandments in the proper context. For example:

1. Schools may teach *about* the Ten Commandments in a Bible-as-literature course.
2. Schools may instruct students in the ethical precepts embodied in the last five commandments in a proper character education program.

3. The commandments can be depicted as an integral part of an historical/educational exhibit such as on the frieze in the U.S. Supreme Court courtroom.

C. Pledge of Allegiance

The case presently pending before the Supreme Court, in *Elk Grove v. Newdow* (No. 02-1624), illustrates a practice that may be constitutional, but represents a form of civil religion that vitiates vital religion. In my opinion, teacher-led recitation of the Pledge of Allegiance does not violate the Establishment Clause for several reasons.

First, the Pledge of Allegiance is not a religious exercise. It is a secular pledge, which, when taken as a whole, is intended to inspire patriotism. It does not have the purpose or primary effect of advancing religion. At most, it is an acknowledgment of this nation's religious roots.

Second, this reference to America's religious character does not play favorites. A pledge to "one nation, under Jesus," or "under Buddha" would be difficult to defend. True, the word "God" implies a certain monotheism, and the phrase "under God" is not a perfectly nuanced reflection of America's religious pluralism. But it is hard to come up with a more inclusive phrase than this one.

Third, students cannot be compelled to recite the Pledge – with or without the words "under God." The Supreme Court ruled eleven years before "under God" was added to the pledge in 1954 that students have the right to refuse to pledge allegiance to the flag. *West Virginia v. Barnette*, 319 U.S. 624 (1943). Students who object to reciting the Pledge cannot be compelled to say it or disciplined for not participating.

That said, what is legal and constitutional is not always helpful or wise. One wonders if including the words "under God" in the Pledge has done religion any favors. Civil religion in its various configurations has long been a pervasive part of American political culture. In its more benign forms, civil religion serves as a unifying, cultural balm that reminds us of our religious roots as a nation. But it can easily and often morph into an idolatry of nationalism or, at the very least, result in the trivialization of religion.

Simply stated, civil religion is not the same as heartfelt, vital religion. Ceremonial religion is not life-altering, world-changing religion. "Ceremonial deism," as it is sometimes called, is a pale substitute for authentic faith. Indeed, one of the traditional arguments in favor of the constitutionality of this and other forms of ceremonial deism is that, through long use and rote repetition, the words have lost any religious import they might have had. In short, what is commonplace becomes mundane.

The vitality of religion in America is thus diminished – not enhanced – when people of faith conflate our penultimate allegiance to Caesar with out ultimate allegiance to God.

## IV. Conclusion

We must catch the vision of our nation's founders – religious freedom for all, unaided and unhindered by government, and make it a reality in our day. We must commit ourselves to protecting religious expression in public places – even sometimes from the mouths of public officials – without allowing government officially to promote religion or to pick and choose among religions.

Two founders succinctly expressed this aspiration. Daniel Carroll, a Catholic from Maryland, captured the pith of the free exercise principle when he said, "The rights of conscience are of particular delicacy and will little bear the gentlest touch of government's hand."[4] On the other side of the Potomac, Virginia Baptist John Leland expressed the rationale for the no establishment principle when he exclaimed, "The fondness of magistrates to foster Christianity has done it more harm than all the persecutions ever did."[5]

The stirring words of Carroll and Leland call for government neutrality in religion and highlight the importance of protecting the rights of conscience of every human being. They reflect the bookends for a well-balanced view of a free church in a free state.

Respectfully submitted,

J. Brent Walker
Baptist Joint Committee

[4] *Annals of Congress*, 757 (J. Gales ed., 1834).
[5] C. F. Green, ed., *The Writings of the Late Elder John Leland* (New York: Arno Press 1970), 278.